SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1216

CHARLES ADJMI,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the Opinion of the District Court of Appeal of Florida, Third District entered on April 9, 1968, and reported at 208 So.2d 859.

OPINIONS BELOW

Review is sought of the opinion of the District Court of Appeal of Florida, Third District, entered on April 9, 1968, and reported at 208 So.2d 859 (App. E). Petition for Rehearing was denied May 1, 1968 (App. F). Petition for Writ of Certiorari filed in the Supreme Court of Florida was denied on September 30, 1968 (App. G). The decision of the Supreme Court of Florida is reported at 218 So.2d

163. Petition for Rehearing was denied on October 31, 1968 (App. H). Motion to Stay Mandate was denied by the Supreme Court of Florida on November 13, 1968.

Application for Stay was denied by Mr. Justice Black on December 4, 1968, and Renewed Application for Stay was denied by him on December 28, 1968.

Application for Extension of Time in which to File Petition for Writ of Certiorari was granted by Mr. Justice Fortas extending the time for filing to and including March 30, 1969 (App. I).

The defendant was adjudicated guilty of larceny and sentenced by the Criminal Court of Record in and for Dade County, Florida, on October 6, 1966 to five years imprisonment.

Opinions of Florida courts rendered in proceedings prior to the second trial are reported at 139 So.2d 179 (App. B); 154 So.2d 812 (App. C); 170 So.2d 340 (App. D); 182 So.2d 242.

JURISDICTION

The decision of the District Court of Appeal of Florida, Third District, entered on April 9, 1968, became final upon denial of Petition for Rehearing on May 1, 1968, and determination by the Florida Courts became final upon denial of Petition for Rehearing by the Supreme Court of Florida on Oct 31, 1968.

Time for filing this Petition was extended to March 30, 1969 by Mr. Justice Fortas.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) because a title, right, privilege or immunity claimed under the Constitution of Statutes of the United States was denied by the District Court of Appeal of Florida, Third District. Jurisdiction is also invoked under Rule 19 (1) (a) of the Rules of the Supreme Court of the United States, adopted June 12, 1967, effective October 2, 1967, because a State Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

I.

WHEN CONVICTION IS REVERSED FOR A NEW TRIAL BASED UPON FAILURE OF THE PROSECUTION TO ELECT A SPECIFIC LARCENY CHARGE, MAY ADDITIONAL CHARGES BE FILED AS CONTINUATION AFTER THE STATUTE OF LIMITATIONS HAS RUN?

II.

MAY A DEFENDANT'S INCRIMINATING STATEMENTS BE USED AGAINST HIM AT TRIAL WHEN THEY ARE OBTAINED WITHOUT INFORMING HIM THAT HIS INTERROGATOR WAS IN THE EMPLOY OF THE PROSECUTOR, WHEN HE WAS NOT INFORMED OF HIS CONSTITUTIONAL RIGHTS, AND WHEN HIS COUNSEL WAS NOT PRESENT?

III.

IS THE STATE REQUIRED TO PRODUCE STATEMENTS MADE BY A WITNESS TO A PROSECUTOR IN PREPARATION FOR TRIAL, FOR USE IN IMPEACHMENT AND CROSS-EXAMINATION?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the witnesses against him; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28 UNITED STATES CODE-SECTION 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

RULES OF THE SUPREME COURT OF THE UNITED STATES RULE 19

(1)(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

FLORIDA STATUTE 811.021 (1)(a) (2) (5)

(1) A person who, with intent to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:

(a) Takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, goods and chattels, thing in action, evidence of debt, contract, or property, or article of value of any kind; or

(2) If the property stolen is of the value of one hundred dollars or more, the offender shall be deemed guilty of grand larceny, and upon conviction thereof shall be punished by imprisonment in the state penitentiary not exceeding 5 years, or in the county jail not exceeding 12 months, or by fine not exceeding $1,000.00.

(5) It shall be sufficient for any indictment, information or warrant returned, filed or issued under this section to charge generally that the defendant at the time and in the county specified, did steal the personal property, thing in

action, evidence of debt or contract or article of value out of which the prosecution arose, describing the same in general terms and alleging generally the ownership and value thereof. This section shall not be construed as intending to interfere with the power of the court to require the state to furnish the defendant with a bill of particulars in proper cases and on sufficient showing that cause exists for the same.

FLORIDA STATUTE 920.09

(1) When a new trial is granted such new trial shall proceed in all respects as if no former trial had been had, but where an offense is divided into degrees and the defendant has been convicted of a lesser degree, he cannot thereafter be prosecuted for a higher degree of the same offense.

FLORIDA STATUTE 932.05

Limitation of prosecutions. All offenses not punishable with death, save as hereinafter provided, shall be prosecuted within two years after the same shall have been committed. There shall be no limitation for offenses punishable with death where an indictment has been found or an information filed within two years after the commission of the offense and such indictment or information, because of any defect, omission or insufficiency in the contents or form thereof, is sub-

sequently quashed or set aside after said two year period has elapsed, in that event further indictments may be found or informations filed for such offense within three months after the entry of the order of the court quashing or setting aside the indictment or information, and prosecution thereunder shall proceed as if the same were commenced within two years after the commission of the offense.

STATEMENT OF THE CASE

On April 27, 1960, a single count information was filed in the Dade County Criminal Court of Record, Dade County, Florida charging Charles Adjmi and others with larceny of more than $100.00 from Genevra McAlister in checks, money and securities, between the dates of September 1, 1959 and March 5, 1960. At trial, the court admitted evidence relating to fourteen separate larcenies. Conviction resulted.

The District Court of Appeal of Florida, Third District, affirmed the conviction on the single impulse theory of larceny as a continuing offense. The opinion is reported at 139 So.2d 179 (App. B).

The Supreme Court of Florida quashed that decision and remanded the cause for a new trial, having repudiated the single impulse theory. The Court held that failure to require the State to elect a specific charge constituted reversible error. The opinion of the Supreme Court of Florida is reported at 154 So.2d 812 (App. C). Mandate issued accordingly.

On August 2, 1963, after the two year statute of limitations had run, the State filed ten additional single count informations against the defendants, each separately charging a crime of grand larceny, for which proof had been offered at the first trial. Each new information contained the allegation that it was a "continuation" of the charge of grand larceny set forth in the information of 1960. (App. A).

The defendants were arraigned on each of the new informations. On Motion to Quash, the trial court held that the initial 1960 information had been abandoned by the State filing the additional 1963 charges, and quashed the 1963 informations as barred by the statute of limitations.

Upon appeal by the State, the District Court of Appeal of Florida, Third District, reversed the trial court's ruling and remanded the cause for further proceedings. The opinion is reported at 170 So.2d 340 (App. D).

The Supreme Court of Florida granted certiorari, but on December 26, 1966, the Court discharged the writ it had previously issued. The decision is reported at 182 So.2d 242.

Upon remand, the trial court required the State to elect an information upon which to proceed to trial. The State elected the charge of larceny occurring on January 27, 1960 of checks totaling $119,995.92. That charge had been filed on August 2, 1963, but alleged it was a continuation of the original charge of grand larceny recited in the first single count information filed April 27, 1960.

Defendant waived trial by jury. His trial commenced on September 13, 1966.

At trial, John R. Walsh, a witness for the State, testified about conversations between the defendant and himself shortly before the trial. At that time defendant's counsel was not present. The witness did not caution the defendant that the statements he gave would be used against him at his trial or that he had the right to consult with his attorney, or that he could remain silent. Mr. Walsh did not disclose to Charles Adjmi that he was in the employ of the prosecutor. The incriminating statements he obtained from the defendant concerned discussions of restitution.

The appellate court upheld the admission of the testimony.

Mrs. McAlister, victim of the alleged larcenies and witness for the prosecution, admitted at trial that she had made statements to members of the staff of the State Attorney prior to the filing of the first information. Upon motion, the trial court examined the statements pertaining only to January 27, 1960, in camera, and submitted portions to the defense. The statements were sealed and preserved for review. The defense had requested all prior statements made by the witness for use in cross-examination and impeachment of statements made by her at the first trial and read at the second trial.

The appellate court upheld the court's refusal to furnish counsel the prior statements.

The trial court adjudicated Charles Adjmi guilty, and sentenced him to serve five years in the State Penitentiary. $25,000.00 bond was set.

The District Court of Appeal of Florida, Third District, affirmed the conviction. The opinion is reported at 208 So.2d 859 (App. E). Petition for Rehearing was denied (App. F).

Petition for Writ of Certiorari filed in the Supreme Court of Florida was denied (App. G). Petition for Rehearing was denied on October 31, 1968 (App. H).

HOW THE FEDERAL QUESTIONS WERE RAISED

I. Amended informations

The first federal question concerning denial of due process, and equal protection of law, fair trial, and double jeopardy was raised at every stage of the proceedings. Motion to Compel Election was made at the original trial as soon as it became apparent that evidence of more than one transaction would be offered. The Motions were denied by the trial court, and the decision was affirmed on appeal. It was then reversed by the Supreme Court of Florida which repudiated the single impulse theory on the ground that defendant was denied a fair trial by the inclusion of fourteen charges in a single information, and it was impossible to determine upon which evidence the jury verdict rested. The Court observed in its opinion that a fair trial was essential even for those defendants against whom the evidence was great.

Motion to Quash the additional informations was granted upon remand, the trial court holding in its Amended Order that the initial information was abandoned and that the new informations were barred by the statute of limitations.

The State appealed from that Order and the District Court of Appeal reversed on the ground that the new charges contained statements linking them with the first information, and held that both the old and the new charges remained standing. The court rejected the argument concerning double jeopardy.

The question was again raised on Petition for Writ of Certiorari, which the court dismissed.

The federal question was raised at the second trial (Transcript of Testimony pages 12 through 14). The federal question was decided adversely to defendant on appeal, and was again raised in Petition for Writ of Certiorari, which was denied.

II. Obtaining incriminating statements by subterfuge

The second federal question concerning post-indictment incriminating statements obtained by subterfuge so as to deny defendant his right of effective counsel and protection against self-incrimination was raised at trial, by Motion to Strike the testimony of witness Walsh. The Motion was denied. (Transcript of Testimony p. 310). The question was raised on appeal, the appellate court deciding that **Massiah v. United States**, 377 U.S. 201, 84 S.Ct. 1199 was inapplicable where defendant sought out the witness. The question was renewed in Petition for Writ of Certiorari in the Supreme Court of Florida, which was denied.

III. Production of prior statements for cross-examination and impeachment.

The third federal question concerning requested statements taken by the State Attorney of Mrs. McAlister for use in impeachment and cross-examination was raised at the trial (transcript of testimony pages 246-252) by Motion for Statements, which was denied. On appeal defendant relied upon **Jencks v. United States**, 353 U.S. 657, 77 S. Ct. 1007. The appellate court held that Florida courts maintain that a defendant in a criminal case is not entitled to inspect statements of a prosecution witness which were taken by a prosecuting officer in preparation for trial, whether or not such statements are sought for the purpose of cross-examination or impeachment. The trial court had examined the statements in camera, and had sealed them for inclusion in the record on appeal. The appellate court did not reexamine the statements, but reached its decision without regard to their content.

The question was renewed in Petition for Writ of Certiorari which was denied.

REASONS FOR GRANTING THE WRIT

I. The amended informations

Charles Adjmi's grand larceny conviction was reversed and a new trial granted because the prosecution had not been required to elect a specific instance of grand larceny as the subject of his first trial. Instead, his original trial had proceeded upon an information numerous alleged instances of grand larceny, so that it was impossible to determine upon which allegation the jury had convicted him.

By the time the second trial was held, the state had been permitted to rely upon the original information as valid, and to add each of the several larcenies as an amendment to the information because in continuation of it, although the statute of limitations had run.

Charles Adjmi was then convicted upon an information filed after the expiration of the statute of limitations. He was thereby deprived of due process of law, equal protection of law, and of a fair trial. His rights under the Fourteenth Amendment of the Constitution of the United States were denied him. In addition, he was placed in renewed jeopardy in violation of due process requirements of the Fourteenth Amendment and of the Fifth Amendment applicable to the states through the Fourteenth Amendment.

The Florida District Court of Appeal, Third District, reasoned that each new information filed on August 2, 1963 charged one of the larcenies encompassed by the initial information for which proof had been offered at the first trial. (App. F: 208 So2d 859, referring to 170 So.2d 340). The Court found that the initial information was not abandoned, and that the new charges were not barred by the statute of limitations.

Although Florida Statute 932.05 permits a new trial after a reversal when the statute of limitations has run when an information is quashed for insufficiency in its contents, the appellate court's decision removed this case from the application of that statute. No justification for amending after the expiration of the statute of limitations existed.

As a consequence of the court's decision upholding the validity of the first information, Charles Adjmi was placed in renewed jeopardy at his second trial upon the same information, newly amended. Although the state did finally elect a specific larceny charge as the basis for the second trial, that charge had previously been before the jury at his first trial.

In **Bartkus v. Illinois**, 359 U.S. 121, 3 L ed 2d 684, 79 S.Ct. 676, Mr. Justice Black in his dissenting opinion stated:[1]

> "For I think double prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment, expressed in Palko v. Connecticut, 302 U.S. 319, 82 L ed 288, 58 S.Ct. 149."

The **Palko** decision referred to fundamental principles of liberty and justice.

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[1]Mr. Justice Black also stated at page 151:

"Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers. By the thirteenth century it seems to have been firmly established in England, where it came to be considered as a 'universal maxim of the common law'. It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom, and that it has been recognized here as fundamental again and again . . . While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong for a man to 'be brought into Danger for the same offense more than once'. Few principles have been more deeply 'rooted in the traditions and conscience of our people". (footnotes omitted).

In the dissenting opinion of Mr. Justice Fortas, with whom the Chief Justice and Mr. Justice Douglas joined in **Cichos v. Indiana,** 385 U.S. 36, 17 L ed 2d 175, 87 S.Ct. 271, the question of acquittal or denial at a first trial was thought not to be a valid distinction against a double jeopardy argument.

The fundamental unfairness of repeated attempts by the State to convict Charles Adjmi without regard to his constitutional protections, is apparent from the testimony at the second trial, where it is clear that witnesses were aware of the purpose to comply with the appellate court's decision. Their testimony was tailored to convict this defendant of a particular act on a particular date, and their thinking was aligned with that purpose, perhaps unintentionally.

The circumstances in the case at bar bring it within the exceptions named in **Hoag v. New Jersey,** 356 U.S. 464, 2 L ed 2d 913, 78 S.Ct. 829; **Palko v. Connecticut,** supra; and **Brock v. North Carolina,** 344 U.S. 424, 97 L ed 456, 73 S.Ct. 349.

Equal protection of law should not be withheld merely as the Court deems a defendant guilty or innocent. **Hill v. Texas,** 316 U.S. 400, 86 L ed 1559, 62 S.Ct. 1159. If justice is administered by haphazard methods, law becomes useless as a system and descends to a tool for the affirmation of preconceived notions of guilt.

Denial of equal protection here stems from renewed jeopardy imposed upon the defendant by a second trial upon a charge previously tried.

Florida Statute 932.05 permits further informations to be filed after the statute of limitations has run where the original information is quashed or set aside "because of any defect, omission or insufficiency in the contents or form thereof". Since the appellate court found the information sufficient for at least one larceny, it answered the statute of limitations problem by permitting the new informations to be "in continuation" of the original charge. That result is directly contrary to the purpose and provisions of the statute of limitations, particularly in view of the court's statement (footnote 5 in its opinion) recognizing that Florida Statute 932.05 was not authority for its decision. Defendant was thereby denied equal protection of law.

Denial of equal protection of law results from failure to apply the statute of limitations.

II. OBTAINING INCRIMINATING STATEMENTS BY SUBTERFUGE

When the Court permitted the use of incriminating statements against the defendant, although they had been obtained after the filing the information, and without his knowledge that his interrogator was in the employ of the prosecutor, or that counsel could assist him, it denied constitutional rights.

Charles Adjmi was denied his constitutional protection against self-incrimination under the Fifth Amendment, applicable to the States through the Fourteenth Amendment. **Malloy v. Hogan,** 378 U.S. 1, 12 L ed 2d 653, 84 S.Ct. 1489.

He was deprived of his right to counsel under the Sixth Amendment applicable to the States through the Fourteenth Amendment. **Gideon v. Wainwright,** 372 U.S. 335, 9 L ed 2d 799, 83 S. Ct. 792.

Right to counsel is fundamental to a fair trial and obligatory on the States. **Escobedo v. Illinois,** 378 U.S. 478, 12 L ed 2d 977, 84 S.Ct. 1758.

Statements obtained from custodial interrogation require warnings of the right to an attorney and their possible use in evidence in the absence of a clear, intelligent waiver. **Miranda v. Arizona,** 384 U.S. 436, 16 L ed 2d 694, 86 S.Ct. 1602.

The right to effective counsel precludes secret interrogation of the defendant which contravenes fundamental rights. **Spano v. New York,** 360 U.S. 315, 3 L ed 2d 1265, 79 S.Ct. 1202; **Massiah v. United States,** 377 U.S. 201, 12 L ed 2d 246, 84 S.Ct. 1199.

Massiah is applicable and binding on the states. **McLeod v. Ohio,** 381 U.S. 356.

In **Burgett v. Texas,** __U.S.__, 19 L.ed 2d 319, 88 S.Ct. __ (1967), this Court stated that although it does not sit as a court of criminal appeals to review state cases, and states are free to provide their procedures, those procedures must not infringe Federal Constitutional guarantees. Those limitations sometimes touch rules of evidence.

Recently, in **Mathis v. United States,** ____ U.S. ____, 20 L ed 2d 381, 88 S.Ct.____, this Court held that the use of oral statements obtained from a defendant while he

was in jail serving another sentence, without warnings that the evidence obtained could be used against him, and that he had a right to remain silent, required reversal. The court affirmed its decision in Miranda, supra, and refused to narrow its scope to questioning by an interrogator concerning the case under investigation while Defendant is in custody for that offense.

III. PRODUCTION OF PRIOR STATEMENTS FOR CROSS-EXAMINATION AND IMPEACHMENT

Deliberate concealment or suppression of material evidence by the State impairs the constitutional rights of an accused.

The question presented by the court's refusal to furnish for impeachment and cross-examination statements made by a witness to the prosecution in preparation for trial, concerns principles enunciated in **Brady v. Maryland,** 373 U.S. 83, 10 L ed 2d 215, 83 S.Ct. 1194. The question is presented under circumstances of **Jencks v. United States,** 353 U.S. 657, 1 L ed 2d 1103, 77 S.Ct. 1007 and of 18 U.S.C. 3500.

Suppression by the prosecution of requested evidence favorable to an accused violates due process of law where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution, **Brady v. Maryland,** supra.

Refusal to afford defendant statements of Mrs. McAlister requested for impeachment and cross-examination, resulted in violation of Sixth Amendment rights of con-

frontation, obligatory on the States through the Fourteenth Amendment. **Pointer v. Texas,** 380 U.S. 400, 15 L ed 2d 923, 85 S.Ct. 1065; **Douglas v. Alabama,** 380 U.S. 415, 13 L ed 2d 934, 85 S.Ct. 1074.

The right of cross-examination is contained in the right of confrontation. **In re Oliver,** 333 U.S. 257, 92 L ed 682, 68 S.Ct. 499; **Turner v. Louisiana,** 379 U.S. 466, 13 L ed 2d 424, 85 S.Ct. 546.

In Florida, a defendant is entitled to inspect for cross-examination purposes a transcript of statements of prosecution witnesses taken by the prosecution before a magistrate. **Jackman v. State,** 140 So.2d 627 (Fla. App. 1962). No valid distinction exists to preclude such use at trial.

Although the **Jencks** principle was redirected under the **Jencks Act,** 18 U.S.C. 3500 (1965), its rationale was compelled under the Sixth Amendment.[2] An accused should not be denied the opportunity to bring every relevant piece of evidence on the question of guilt or innocence to his defense.

Advances in achieving truth and justice brought about by this Court's decision in **Brady v. Maryland,** supra, and in the **Jencks** case, should not be abandoned.

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[2]Vol. 55 American Bar Association Journal, page 152, Semerjian, The Right of Confrontation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District, should be granted, and the decision of that Court reversed.

Respectfully submitted,

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By _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was mailed to HON. EARL FAIRCLOTH, Attorney General, 1350 N.W. 12th Avenue, Miami, Florida and HON. EARL FAIRCLOTH, Attorney General, The Capitol, Tallahassee, Florida, this ____ day of March, 1969.

_____

APPENDIX

APPENDIX A

(TITLE OMITTED)

INFORMATION FOR GRAND LARCENY

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, in and for Dade County, prosecuting for the State of Florida, in the said County, under oath, information makes that JOSEPH ADJMI, CHARLES ADJMI, EMILE HALFON, also known as JOHN McGURNEY, and ALBERT GEORGE, also known as FATHER LEON, on the 27th day of January, 1960, in the County and State aforesaid, did then and there unlawfully and feloniously take, steal and carry away the money, goods and chattels of one GENEVRA M. McALISTER, to-wit: checks totalling ONE HUNDRED NINETEEN THOUSAND NINE HUNDRED NINETY FIVE and 92/100 DOLLARS ($119,995.92), good and lawful money of the United States of America, a further and more particular description of said money, goods and chattels being to the State Attorney unknown, being then and there of the value of more than ONE HUNDRED DOLLARS ($100.00), good and lawful money of the United States of America, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

That, subsequent to the 27th day of January, 1960, as aforesaid, a Criminal Information was filed on the 27th day of April, 1960, in the Criminal Court of Record in and for Dade County, Florida, being Case No. 60-2001, wherein the said defendants, JOSEPH ADJMI, CHARLES

ADJMI, EMILE HALFON, also known as JOHN McGURNEY, and ALBERT GEORGE, also known as FATHER LEON, were charged with the crime of Grand Larceny. The defendants were arrested on capiases issued in this case and thereafter the defendants, JOSEPH ADJMI, CHARLES ADJMI and EMILE HALFON, appeared on the 29th day of April, 1960, before the said Criminal Court of Record in and for Dade County, Florida, and entered their respective pleas of not guilty to the charge of Grand Larceny, as recited in Case No. 60-2001. Thereafter, ALBERT GEORGE, also known as FATHER LEON, appeared before the Criminal Court of Record in and for Dade County, Florida, on the 18th day of October, 1960, and entered his plea of not guilty to the charge of Grand Larceny, as recited in Case No. 60-2001. Thereafter, under appropriate proceedings in the Supreme Court of Florida and the District Court of Appeal, Third District, and pursuant to these proceedings, a mandate was issued by the District Court of Appeal, Third District, on the 3rd day of July, 1963, returning Case No. 60-2001, charging the said defendants with Grand Larceny as aforesaid, to the jurisdiction of the Criminal Court of Record in and for Dade County, Florida. Pursuant to said decision and mandate, this is a continuation of the charge of Grand Larceny, as recited in Case No. 60-2001, filed with the Criminal Court of Record in and for Dade County, Florida.

/s/ RICHARD E. GERSTEIN
State Attorney, Eleventh Judicial Circuit of Florida, in and for Dade County.

STATE OF FLORIDA,
COUNTY OF DADE.

Personally appeared before me, RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, in and for Dade County, who, being first duly sworn, says that the allegations as set forth in the foregoing Information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged.

/s/ RICHARD E. GERSTEIN
State Attorney, Eleventh Judicial Circuit of Florida, in and for Dade County

Sworn to and subscribed before me this 2nd say of August, A.D., 1963.

J: F. McCRACKEN,
Clerk of the Criminal Court of Record, Dade County, Florida

By /s/ WANA E. SAMPSON
Deputy Clerk

(SEAL, CRIMINAL COURT OF RECORD)

defendants JOSEPH ADJMI, CHARLES ADJMI, EMILE HALFON, aka JOHN McGURNEY, and ALBERT GEORGE, aka FATHER LEON, arraigned in open Court, and to the within Information pleaded

Not Guilty (All)

/s/ J D TOTE OCT 4 1963

Case No. 60-2001

APPENDIX B

(TITLE OMITTED)

Convicted, of grand larceny, in the Criminal Court of Record, Dade County, George E. Schulz, J., the defendant appealed. The District Court of Appeal, Pearson, Tillman, C. J., held, inter alia, that where evidence revealed complicated plan without cessation or interruption involving making of many checks as result of fraudulent representations of defendants, in continuous transaction or proceeding instigated by one purpose and impulse, state was not required to elect between any of the "numerous acts of grand larceny" upon which to proceed at trial, and that failure to accord two defendants statutory right to open and close upon final argument to jury required new trial as to them.

Affirmed in part; reversed in part and remanded for a new trial.

1. Criminal Law — 126(1)

To be sure that accused gets constitutionally guaranteed impartial jury, trial judge must order change of venue when there is any doubt as to the ability to furnish him impartial jury. F.S.A.Const. Declaration of Rights, § 11.

2. Criminal Law — 1150

On application for change of venue on ground that impartial jury cannot be had in county, trial judge must

apply law to condition in count where trial is set, and having made his determination, his refusal of motion will not be held error unless it appears that court acted unfairly and commited palpable abuse of judicial discretion, guided by law. F.S.A.Const. Declaration of Rights, § 11.

3. Criminal Law — 121

No abuse of discretion appeared in denying change of venue from county in grand larceny prosecution sought on ground that impartial jury assertedly could not be obtained because of effects of mass media of publication.

4. False Pretenses — 49(1)

Where it was clear that theatrical staging of complicated web of falsehood to induce elderly lady to part with her money was as much a part of plan to obtain her money as was claimed value of merchandise stored in her house, lack of proof that objects stored were worth what they were represented to be did not render evidence insufficient to show larceny by false pretenses.

5. Criminal Law — 678(1)

Where evidence revealed complicated plan without cessation or interruption involving making of many checks as result of fraudulent representations of defendants, in continuous transaction or proceeding instigated by one purpose and impulse, prompted by one design, state was not required to elect between any of the "numerous acts of grand larceny" upon which to proceed at trial.

6. Criminal Law — 645, 1166½(1)

Failure to accord two defendants who offered no evidence statutory right to open and close upon final argument to jury, where they were represented by same counsel as codefendants who offered evidence required new trial for such two defendants. F.S.A. § 918.09.

7. Criminal Law — 721(1), 1171(5)

Comment on failure of defendants to testify in their own behalf is reversible error.

8. Criminal Law — 721(6)

Argument by prosecution, clearly referring to failure of defense in grand larceny prosecution to make complete their affirmative proposition of sale that, "Did you hear a single iota of testimony that anything contained in these were delivered to her? No", did not constitute a comment on failure of defendants to testify in their own behalf.

9. Criminal Law — 1038(1)

Portions of charge wherein court stated that guilt or innocence was for jury alone to decide, that court made no suggestion as to what had or had not been proven and that jurors as triers were to determine facts beyond and to exclusion of reasonable doubt that defendants were guilty of violation of statute, construed with charge as whole, revealed no fundamental error reviewable on appeal in absence of objection below. 31 F.S.A. Florida Appellate Rules, rule 6.16(a).

10. Fines — 11

Statute authorizing sentence for default in payment of fine constitutes in effect an enlargement on legal sentence in each case where imprisonment and fine are authorized. F.S.A. § 921.14.

11. Criminal Law — 1215

Sentence was legal which imposed a maximum term of imprisonment plus fine, in default of payment of which there was added imprisonment, in view of statute authorizing sentence for default in payment of fine. F.S.A. §§ 775.06, 811.021(2), 921.14.

Sibley, Grusmark, Giblin, King & Levenson and Ben Cohen, Miami Beach, for appellants.

Richard W. Ervin, Atty. Gen., and David U. Tumin, Asst. Atty. Gen., for appellee.

Before PEARSON, TILLMAN, C. J., and CARROLL and HENDRY, JJ.

PEARSON, TILLMAN, Chief Judge.

The appellants, Joseph Adjmi, Charles Adjmi, Albert George and Emile Halfon, are four of six defendants who were charged with the crime of grand larceny. These four with one other were tried together. The sixth, Joseph Lependorf, could not be found. The jury returned a verdict of guilty as to each defendant tried, except for Leon Adjmi, who was found not guilty.

The court entered judgments of guilty against Joseph Adjmi, Charles Adjmi, Albert George and Emile Halfon and imposed upon each the maximum prison term of five years and a fine of $1,000.00. The fines carried the provision that upon default in their payment an added six-month imprisonment would be imposed.

The appellants have presented seven points; each has been considered. We have determined that the appellants, Joseph Adjmi, Charles Adjmi and Albert George, received a full and fair trial and that no reversible error has been made to appear as to their conviction. The appellant Emile Halfon was deprived of a substantial procedural right during the trial and accordingly is granted a new trial.

Under the first point the appellants urge that the trial judge committed error when he denied their motion for a change of venue. The day preceding the trial, the defendants filed a motion for a change of venue, asserting in substance that the mass media of publication, including radio, television and the newspapers had so aroused public sentiment against them that they could not be given a fair trial in Dade County. At the outset of the trial, the defendants presented their motion and were permitted to introduce evidence to support it. The court denied the motion.

In order to select a jury, 87 veniremen were called. The examinations on **voir dire** took almost three full days, and the defendants exhausted all of their peremptory challenges. They then renewed their motion for a change of venue. The court again denied the motion; the defendants refused to tender the jury which was nevertheless sworn to try the case.

[1] There is no question of the law to be applied. Section 11, Declaration of Rights, Constitution of the State of Florida, F.S.A., guarantees to every accused the right of trial by an impartial jury. In order to be sure that an accused gets an impartial jury, the trial judge must order a change of venue when there is any doubt as to the ability of the State to furnish that impartial jury. Singer v. State, Fla. 1959, 109 So.2d 7, 14.

[2] The trial judge must apply the law to the condition in the county where the trial is set. Having made his determination, his refusal of such motion will not be held as error unless it appears that the court acted unfairly and committed a palpable abuse of discretion. The discretion referred to is judicial discretion guided by the law. Atkins v. State, 100 Fla. 897, 130 So. 273.

[3] We have reviewed the exhibits (newspaper articles) submitted by the defendants to the trial court and the record of the **voir dire** examination of the prospective jurors. The newspaper reports of the charges against the defendants are numerous and in some instances colorful. This is inevitable in our society where a premium is placed upon the full reporting of cases of public interest. The charges against these defendants were interesting. It is true that a good many of the troubles of Charles and Joseph Adjmi culminated near the date of this trial; but the articles did not in the judgment of the trial judge amount to, as the defendants have charged, "a trial by the newspapers". We find nothing in them to suggest a reasonable doubt as to the ability of the State to furnish an impartial jury.

The review of the record of the **voir dire** examinations of the prospective jurors leaves us with the same result. The fact that 87 prospective jurors were called does not indicate that the cour was straining to get a jury. The case was well-known and the trial judge scrupulously allowed all proper challenges for cause. The defendants and the State exercised many peremptory challenges. The jury selected was qualified. We conclude that no abuse of discretion appears. Cf. Powell v. State, 131 Fla.254, 175 So. 213.

An outline of the evidence presented to the jury is now in order. The crime of which the appellants stand convicted is based upon their dealings with a lady well past middle life. In order to properly discuss the points urged by appellants, it is necessary to set forth some history of this relationship. Because the jury has accepted the version of the State's witnesses, we will present that version.

Mrs. McAlister resided in Miami, Florida. Her husband died five years before she met the defendants. He left her in sole possession of over one million dollars and a home where she lived by herself.

In October, 1959, when she was 72 years old, she met Charles Adjmi, a dealer in art objects. He was brought to her home by an acquaintance. Shortly thereafter Charles returned uninvited and brought with him a large painting, a replica of "The Last Supper". Charles asked her to store the painting for him because he had sold it to a gentleman who was suddenly called away. Then Charles took her to dinner and presented his brother, Joseph, who was in business with Charles. Joseph brought along a carved

ivory bridge and some porcelain. After assuring her that the bridge was very valuable Charles begged her to loan them some money. Joseph and Charles told her that the money was necessary to save their business and that the bridge and the poreclain would be security for the loan. On November 10, 1959, she gave them a check for $6,500.00. The check was endorsed "Dresden Galleries by Joseph Adjmi, owner."

A few days later Joseph and Charles came to see her and told her that they had certain merchandise in "customs". This merchandise, they said, was already sold to "Marshal Field", but they needed $30,000.00 immediately to "redeem" the merchandise or they would lose the sale. Later evidence established that the Adjmis had no business relation with the "Marshal Field" store in Chicago. On November 17, 1959, she gave them a check for $30,000.00, and received a memorandum from Charles. The memorandum stated "January 1st, 1960 will sell Last Supper, January 15 will sell large ivories, large bridge. All monies go to Mrs. McAlister up to $30,000+$6,500.00" The check was deposited in the account of J. & C. A. Corp. which was the business account of Joseph and Charles Adjmi.

Joseph and Charles visited Mrs. McAlister several times each week and brought her presents of linen handkerchiefs, strings of pearls and knicknacks. Together they brought to her house for safekeeping a great many ivories and other objects. They explained to her that they had a purchaser for these items. He was described as a Mr. John McGurney, a very wealthy gambler from Las Vegas.

Joseph and Charles brought Mr. McGurney to inspect the merchandise. Mrs. McAlister heard them discussing a price. The bargaining started at one million dollars and reached an agreed price of $600,000.00, which McGurney said he would pay, "$400,000.00 in certified checks and $200,000.00 in cash." Mr. McGurney was Emile Halfon, one of the defendants. Shortly thereafter on December 17, 1969, Mrs. McAlister gave Joseph a check for $56,000.00 because he begged for money to get additional goods out of "customs". The money represented by this check went into the J. & C. A. Corp. account.

On the same day that McGurney, also known as Emile Halfon, inspected the merchandise, he mentioned in Mrs. McAlister's presence, that he understood "Father Leon" was coming from France to bring some priceless jades and paintings. Soon thereafter Charles asked and received on January 5, 1960, a $5,000.00 "loan" from Mrs. McAlister so that Charles might go to France and contact "Father Leon". The loan went into the account of J. & C. A. Corp.

Charles explained that Father Leon operated a lace factory in order to support an orphanage which he likewise operated. Both were said to be in France. Charles brought Father Leon to Miami. Joseph met them at the airport and brought Father Leon directly to Mrs. McAlister's home. Father Leon blessed her; she was deeply touched because they professed the same faith. Father Leon was the defendant, Albert George.

Mrs. McAlister gave Joseph $90,000.00 on January 7, 1960, and $100,000.00 on January 15, 1960, so that she might have a one-third interest in the lace factory and

a lingerie factory. (The week's delay was so that she might liquidate some of her securities.) Of course, Father Leon was very grateful. He changed the name of the orphanage to "The Genevra McAlister Orphanage". He said the children in their gratitude went through the village collecting money, penny by penny, and that they bought a watch to send to her. She was to have a cottage on the grounds in Leon, France. Mrs. McAlister gave a check for $18,500.00 to pay the taxes on the lace factory. The check was deposited by Joseph in the corporation account he and Charles owned.

Father Leon made two trips to France and he brought to her house lace, paintings, white jade, and two vases from the Louvre. Charles and Joseph brought Halfon, alias John McGurney, to view the spoils. McGurney said he would pay $2,000,000.00 and Charles and Joseph said Mrs. McAlister would be returned all her advances.

But the money didn't come and Charles and Joseph said they needed more money; so she advanced more. On January 27th this money was paid by checks of $21,700.00 and $35,617.00 to the J. & C. A. Corp. Then there was no more money in Miami, but Joseph said that if she did not get more money she would lose everything.

Joseph and Mrs. McAlister went to Pittsburgh and liquidated her accounts there on January 29th. Joseph received a total of $142,418.00. But Joseph told her he would need more money to save what she already had in the lace and lingerie factory deals. She liquidated her stock accounts and gave him cashier's checks and cash totaling $71,791.50 on February 10th. The checks went into the Charles and Joseph Adjmi business account.

Mrs. McAlister owned some bonds. She tried to borrow money on them but at Joseph's suggestion she gave them to Halfon (McGurney). Halfon said he would give the $50,000.00 from the sale of the bonds to Joseph. This was in February. During that month Halfon (McGurney) received from the Charles and Joseph business bank account checks totaling $153,250.00. These checks were each marked, "Commission on McAlister sale". This sum in addition to checks for $9,500.00 in December, $20,000.00 in January and $254,500.00 in March. They were all endorsed and cashed at the bank. It may be noted that Albert George (Father Leon) also received many thousands of dollars from the same source.

Joseph and Halfon (McGurney) took Mrs. McAlister to Pittsburgh on February 18th; she had some assets there. The proceeds from these assets were converted to a check and signed over to the J. & C. A. Corp. The check was for $120,000.00. Joseph said the silk bill had not been paid and if they didn't pay the bill they would get no more silk.

While in Pittsburgh it was necessary for Mrs. McAlister to go into her safety deposit box there. Joseph came into the vault with her and wrapped in a newspaper bonds of a face value of $175,000.00. Mrs. McAlister never saw the bonds again but bonds of $115,000.00 face value were sold by Joseph Adjmi in Miami on February 19th.

The day that Joseph brought Halfon (McGurney), the gambler, to Mrs. McAlister's home, Charles had suggested to her a romance might be arranged. This suggestion was often renewed and culminated in a marriage between Mrs. McAlister and Halfon on February 29, 1960.

That same day Mrs. McAlister testified she gave Joseph $11,000.00 and stock valued at $20,000.00. On March 3rd she turned over to Joseph a check from the sale of stock for $7,126.00. It was deposited to the account of J. & C. A. Corp.

Mrs. McAlister insisted that her new husband accompany her to Pittsburgh so that he could visit her family priest. This was preparatory to his promised conversion and a church marriage. Under the wise questioning of the priest, cracks in the new husband's story began to appear. Mrs. McAlister returned to Miami, to her solitary life and to get back her money.

The defendants introduced four bills of sale all signed:

"Buyer Genevra M. McAlister

Sellers Joseph Adjmi, Charles Adjmi."

They were dated: January 23, 1960; February 16, 1960; February 19, 1960; and March 2, 1960. They purport to show purchases by Mrs. McAlister of listed art objects for $689,289.00. Each bill of sale contained the following language:

> "The Buyer acknowledges to the Seller that by reason of the foregoing, she has established independently, and without the aid or influence of the Seller, the value, brand, antiquity, size, weight, description, condition of the goods herein sold; that she examined all goods and merchandise and accepts title to same as is. She also acknowledges that the above merchandise has been received in good order.

> "The Buyer further acknowledges that any oral representations made by the Seller or any of his agents, servants or employees as to the value, brand, kind, antiquity, size, weight, description, condition of the goods herein sold, are not a part of this Agreement unless contained herein in writing."

Mrs. McAlister said she did not remember signing any of the papers but that she signed many papers at Joseph's request when he told her they were necessary to the orphanage or the lace factory. The jury believed her.

We have not combed the record for all of the money received by Joseph and Charles Adjmi, but the foregoing described the procedure followed. As to the amount received, it was sufficient to qualify as grand larceny.

[4] We turn now to a discussion of appellants' second point. Under this point it is urged that the state failed to prove that the art objects were **not** worth what the defendants represented to Mrs. McAlister. Thereupon it is argued that because Mrs. McAlister admitted that she relied on the value of the merchandise stored in her house, no larceny by false pretenses had been proved. Clifton v. State, 76 Fla. 214, 79 So. 707, and Ex parte Stirrup, 155 Fla. 173, 19 So.2d 712, are cited by appellants for the rule that a false representation and reliance thereon are necessary elements to establish the crime of obtaining property under false pretenses.

It may be noted from the statement of the plan followed that there is doubt that all the money was obtained in reliance upon any single representation. Nevertheless,

the rule cited in Clifton v. State, supra, and Ex parte Stirrup, supra, is met because it is clear that the theatrical staging of the complicated web of, falsehood to induce this elderly lady to part with her money was as much a part of the plan, as was the claimed value of the merchandise stored in her home.

Appellants' third point urges error because the trial judge denied their motion to require the State to elect one of the "numerous acts of grand larceny" upon which to proceed at the trial. The ruling was made under the following circumstances.

[5] The appellants were charged in a single count. At the trial the State in its opening statement to the jury set forth its intent to prove the sequence of events which have been outlined in the statement of facts. The motion to compel an election was made at the close of the State's opening address upon the ground that the State intended to offer evidence of numerous acts of grand larceny. The motion was again made at the close of the State's case. In each instance the court denied the motion. Hamilton v. State, 129 Fla. 219, 176 So. 89, 112 A.L.R. 1013, and Green v. State, 134 Fla. 216, 183 So. 728, are cited as authority for the rule that when two distinct offenses are charged in an indictment or developed by the evidence, the State should be required to elect on which of the charges it intends to claim a conviction.

Here again the law is clear, but does the case before us come within the rule? We think not; the judge correctly found that the evidence revealed a completed plan without cessation or interruption. In the Hamilton case, supra, the receiving or concealing different articles of

stolen property at different times and on separate and **unconnected** occasions constituted separate offenses. Here the taking of the many checks, although on different dates, as a result of the fraudulent representations of the defendants was a continuous transaction or proceeding instigated by one purpose and impulse. So the separate occasions when money was paid was prompted by **one** design, **one** purpose, **one** impulse and these "separate" occasions constituted a single or continuous act.[1]

The fourth point is presented only on behalf of appellant Halfon. This defendant offered no evidence. His codefendants, who were represented by the same counsel, did offer evidence. Before the defendants' side of the case began, common counsel for all defendants advised the court of Halfon's contention that any evidence offered would not be in his behalf. The court ruled[2] that Halfon, nevertheless, would lose the privilege of opening and closing upon final argument to the jury. The appellant, Halfon, relies upon Faulk v. State, Fla.1958, 104 So.2d 519, for reversal.

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[1]For a discussion on single or separate larceny predicated upon a series of acts over a period of time see annotation and cases cited therein at 136 A.L.R. 948. Also see 2 Wharton's Criminal Law § 450 (12 ed. 1957); 52 C.J.S. Larceny § 53.

[2]"THE COURT: I'm ready to rule. Let the record reflect that the defendants, prior to offering any evidence, have announced to the Court that they intend to offer Defendants' Exhibit A-2 for Identification, Defendants' Exhibit A-4 for Identification, Defendants' Exhibit A-5 for Identification, and Defendants' Exhibit A-8 for Identification and A-9.

"MR. ST. JEAN: That's about all, your Honor. We may not use — Four contracts.

"THE COURT: They are withdrawing A-9. They are offering these in behalf of defendants Joseph Adjmi and Charles Adjmi.

"It is the ruling of the Court that if these are offered into evidence, that they enure to the benefit of all of the defendants, and for that reason the defendants would be precluded from having the closing argument."

[6] This point is clearly settled. The Supreme Court of Florida in the Faulk opinion has reviewed the cases and made a definitive application of the rule. It was held that section 918.09 Fla.Stat., F.S.A. provides that when a defendant offers no testimony in his own behalf except his own, he is entitled to conclude before the jury, and the fact that one defendant may offer testimony that could benefit another is the risk that the State assumes when it elects to charge and try two or more defendants collectively. The trial judge failed to follow the statute and the conviction of Emile Halfon must be reversed for a new trial.

[7] By their fifth point appellants urge that the prosecuting attorney by comment called to the attention of the jury the fact that the defendants failed to testify in their own behalf. We need not cite authority for the rule that such comment is reversible error. It is well settled that any statement which is reasonably susceptible to interpretation as a comment upon the defendant's failure to testify, requires reversal.

[8] In order to understand appellant's claim of error, it is necessary to refer to the record for the background of the statement which is charged to be a comment upon the failure of the defendants to testify. The principal basis of the defendants' defense was their position, urged by their counsel, that the sums of money they had received from Mrs. McAlister were, in fact, payments to them for the purchase price of a long list of art objects. In closing argument defense counsel urged that the transactions between Mrs. McAlister and the Adjmis were in fact sales and defense counsel then posed a question to the jury as to whether the State had ever denied that Mrs. McAlister received the merchandise which the defendants had alleged was sold to her. Specifically defense counsel argued as follows:

"They brought her attorney in. **He couldn't deny that she had signed it.** But that is when she got her money. But is that all she got? You heard the State tell you that they were going to bring in the exhibits and show you how they robbed this old lady. Did they bring it? **The next room** is loaded with merchandise that she got, brought in here by the State, but would they dare show you one article that she got? Why? Because the State must have been afraid that it would be appraised at far more than she gave out." (Emphasis supplied)

* * * * *

"* * * She did not get swindled out of a dime. She owns all of these exhibits that are next door, the things that the State would not bring for you to see * * *"

In rebuttal to defense counsel's argument, the prosecuting attorney stated in final argument as follows:

"**Mr. Cohen told you that the items contained in each of these exhibits is in the back room. I say he's wrong. They are not.** That's right. Some of these items are—nothing here. Her name is on these; correct.

"Did you hear a single iota of testimony that they ever delivered the items contained thereon? I told you in my opening statement that she doesn't know what she signed, that she signed anything they gave her. Did you hear a single iota of testimony that anything contained in these were delivered to her? No." (Emphasis supplied)

The question then is whether the words "Did you hear a single iota of testimony that anything contained in these were delivered to her? No.", may reasonably be construed as a comment upon the defendant's failure to testify? We think not, because the statements clearly refer to the failure of the defense to make complete their affirmative proposition of a sale. It would be a farfetched and strained construction of the sentence quoted to interpret it as a comment upon the failure of the defendants to testify when it was clearly and in context an attempted refutation of defendants' argument that the defendants had made a case of a bona fide sale, The appellants rely most heavily upon Gordon v. State, Fla.1958, 104 So.2d 524 where the Florida Supreme Court emphasized that it has traditionally adhered to the rigid rule which precludes comment on defendant's failure to testify, regardless of why or how the prejudicial remark is made. We do not think that Gordon v. State, supra, applies inasmuch as it does not appear from a reading of the record that a prejudicial comment was made or that there is any reasonable possibility that the jury could have interpreted the remark in the manner appellants urge.

The opinion of the Supreme Court of Florida in Waid v. State, Fla. 1952, 58 So.2d 146, contains a holding which we find more in point with the present case than the Gordon case, supra. In the Waid case the appellant's attorney, while addressing the jury, had introduced the question of lack of testimony by the defendant. The court held that a defendant may not reap the benefits of failure to testify, such as the escape of cross-examination, and then claim the protection the statute affords if he plays

upon that very failure himself by commenting upon his not having introduced testimony and the reason for it. While the case is not in point on the facts we think that the same reasoning is applicable to the statement which we are considering. Appellants' challenge to the State in their argument could only be met by a discussion of the lack of testimony to support their premise. The appellants should not now be permitted to take advantage of a fair reply to their own challenge.

[9] The sixth point is directed to a sentence in the court's charge to the jury. There was no objection to the portion of the charge now claimed as error, nor was an assignment of error directed to this portion of the charge. The defendants, however, urged this point as fundamental error and that this Court should review the same under Florida Appellate Rule 6.16(a), 31 F.S.A. The salient portion of the rule reads as follows:

> "The court may also in its discretion, if it deems the interest of justice to require, review any other things said or done in the cause which appear in the appeal record, including instructions to the jury."

We have in the exercise of the discretion set forth in the rule considered appellants' contention that the sentence complained of was so prejudicial as to be fundamental error. The challenged sentence appears in the court's discussion of the province of the jury. After instructing the jury that the weight and credit to be given to the testimony of the witnesses is a matter solely for the jury, the court continued:

"The question of guilt or innocence of these defendants is for you, as members of the jury, alone to decide. The Court makes no suggestion to you as to what has or has not been proven; that is a matter of fact solely within the province of the jury.

"Now, I instruct you as the triers of the facts in this case you are to determine under these facts beyond and to the exclusion of a reasonable doubt that the defendants are guilty of the violation of the Statute as heretofore read and defined to you."

Thereafter the court fully instructed the jury that in order for them to find the defendants guilty they must find that the State had proved all of the elements of grand larceny to the exclusion of a reasonable doubt. The court's instruction to the jury continues for some six pages of the record thereafter. The entire tenor of these instructions are that the jury as the sole judges of the facts must determine the question of guilt or innocence from the evidence. The court clearly stated that if the jury believed that the State had failed to prove the material allegations of the information beyond and to the exclusion of reasonable doubt then the appellants were entitled to that reasonable doubt and acquittal.

The instructions to the jury in this case must be read and taken as a whole in determining whether fundamental error has been committed. It is clear to us that no error has been made to appear because, as the Supreme Court of Florida pointed out in Haddock v. State, 141 Fla. 132, 192 So. 802:

> "[T]he instructions should be considered as a whole, and, if as a whole, they are free from error, an assignment predicated on isolated part-graphs, or portions, which standing alone, might be misleading or erroneous, must fail."

[10, 11] Appellants' seventh point raises the question of whether a sentence is legal which imposes a maximum term of imprisonment plus a fine, in default of payment of which there is added a term of imprisonment. The punishment for grand larceny is provided for in Florida Statutes, Section 811.021(2), F.S.A.:

> "* * * Imprisonment in the state penitentiary not exceeding 5 years, or in the county jail not exceeding 12 months, or by fine not exceeding $1,000.00."

Unquestionably the court was authorized, under Florida Statutes, Section 775.06 to punish by both imprisonment and fine.[3] The question presented concerns imposing the added term of imprisonment for failure to pay the fine after which the term of imprisonment might exceed the limits set in the statute authorizing imprisonment for the crime of grand larceny. Section 921.14, Fla.Stat., F.S.A., is authority for the imposition of a term of imprisonment for default in payment of a fine. This section reads as follows:

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[3]Section 775.06, Fla.Stat., F.S.A., provides:

"* * * and whenever the punishment is prescribed to be fine or imprisonment (whether in the state prison or county jail), in the alternative, the court may, in its discretion, proceed to punish by both fine and such imprisonment."

> "Sentence of imprisonment for default of payment of fine or fine and costs. Whenever a court shall sentence and adjudge a person to pay a fine or a fine and costs of prosecution such court shall also provide in such sentence a period of time for which such person shall be imprisoned in default of the payment of the same. Such term of imprisonment shall be served in the county jail if the offense for which sentence is imposed is a misdemeanor and in either the state prison or the county jail if the offense for which the sentence is imposed is a felony, and the sentence shall specify where such term is to be served."

The appellants rely upon Lyle v. Walker, 100 Fla. 1457, 131 So. 383, which held that a county judge who had imposed the maximum imprisonment fixed by law and in addition thereto imposed a fine was within his jurisdiction, but when he attempted to impose an additional imprisonment for failure to pay the fine he had exceeded his jurisdiction as defined by the law. That case was decided in 1930. Subsequent thereto, the legislature passed Section 921.14, supra, (Chapter 19554, § — Laws of Florida, 1939). The effect of this statute was to authorize a sentence for default in payment of a fine. This authorization, in effect, enlarged the legal sentence in each case where an imprisonment and fine are authorized. Cf. Dixon v. Mayo, Fla.1953, 64 So.2d 176, and Williams v. State, 158 Fla. 415, 28 So.2d 691.

Having examined each point relied upon by the appellants for reversal we hold that the judgment and sentence as to Joseph Adjmi, Charles Adjmi and Albert George is affirmed. Aso to the defendant Emile Halfon, also known as John McGurney, the judgment and sentence against him is reversed and his case remanded for a new trial.

Affirmed in part; reversed in part and remanded for new trial as to Emile Halfon.

On Petition for Rehearing Granted

PER CURIAM.

The appellants, Joseph Adjmi, Charles Adjmi, Emile Halfon and Albert George filed a joint petition for rehearing. We granted limited rehearing "for the purpose of further oral argument and consideration of the question of whether the appellant, Albert George, is entitled to a new trial upon the ground that the trial judge erred in denying said appellant the privilege of opening and closing upon final argument to the jury."

It is apparent upon reconsideration that appellant George is entitled to a reversal of the judgment and sentence against him upon the same grounds that relief was accorded to Emile Halfon in the opinion and judgment of this court filed February 22, 1962. It is therefore ordered that said opinion and judgment is amended by the inclusion of the following additional paragraphs:

"As to the defendant Albert George, also known as Father Leon, the judgment and sentence against him is reversed and his case remanded for a new trial.

"Affirmed in part; reversed in part and remanded for a new trial as to Emile Halfon and Albert George."

The petition for rehearing is denied except for the amendment of our opinion and judgment as herein provided.

It is so ordered.

APPENDIX C

(TITLE OMITTED)

Proceeding on petition for certiorari directed to the District Court of Appeal, Third District. The Supreme Court, Hobson, J. (Retired), held, inter alia, that where defendants were charged in a single count with single act of grand larceny by false pretenses, and state put in evidence proof of 14 separate offenses of larceny by false pretenses, and jury verdict of guilty was general, defendants were entitled to a new trial, where state declined to choose which single act it would rely on for conviction.

Decision of Court of Appeal, Fla.App., 139 So.2d 179, quashed with direction.

Thomas, Thornal and O'Connell, JJ., dissented.

1. Courts — 216

Decision of District Court of Appeal the state need not elect one of several acts of grand larceny by false pretenses put in evidence in prosecution founded on information which charges in single count a single act of grand larceny by false pretenses was in conflict with decisions of Supreme Court, and hence Supreme Court had jurisdiction of petition for certiorari directed to the District Court of Appeal.

2. Criminal Law — 678(1)

Where defendants were charged in a single count with single act of grand larceny by false pretenses, and state put in evidence proof of 14 separate offenses of

larceny by false pretenses, and jury verdict of guilty was general, defendants were entitled to a new trial where state declined to choose which single act it would rely on for conviction.

3. Courts — 216

Where Supreme Court had jurisdiction of petition for certiorari directed to District Court of Appeal on ground that its decision was in conflict with Supreme Court decisions, Supreme Court was charged with duty of considering case on its merits as though it had come to Supreme Court originally on appeal.

4. False Pretenses — 7(3)

Value is a matter of opinion, and crime of larceny by false pretenses requires a misrepresentation of a past or existing fact as distinguished from mere opinion, and hence such crime could not be based on a misrepresentation of value of merchandise.

5. Criminal Law — 633(1)

Equal justice under law is the capstone of American jurisprudence, and every defendant in a criminal case is guaranteed by the Constitution a fair and impartial trial. F.S.A. Const. Declaration of Rights, § 11.

Sibley, Grusmark, Giblin, King & Levenson and Irving B. Levenson, Miami Beach, for petitioners.

Richard W. Ervin, Atty. Gen., and David U. Tumin, Asst. Atty. Gen., for respondent.

HOBSON, Justice (Ret.).

This case is before the Court upon a petition for certiorari directed to the District Court of Appeal, Third District. The petitioners were defendants in the Criminal Court of Record in and for Dade County, Florida, and occupied the position of appellants on appeal to the said District Court of Appeal.

The petition for certiorari is predicated upon the theory of conflict between the decision of the said District Court and several prior decisions of the Supreme Court of Florida.

It is alleged by petitioners that the information filed against them contained but a single count charging a single act of grand larceny by false pretenses. They say however that the State over the objection of petitioners' counsel was permitted "to prove at least fourteen (14) occasions separated in terms of time from each other by approximately one week on the average with two days as the shortest period and one full month as the longest when the petitioners actually received money or property belonging to and parted with by the prosecutrix." After the State had declared in its opening address to the jury that it intended to prove the aforementioned enumerated occasions when the petitioners allegedly unlawfully separated the prosecutrix from her money or property counsel for petitioners immediately moved the trial court for a compulsory election by the State as to which single act of suggested grand larceny by false pretenses it would rely upon for conviction. This motion was denied.

Consequent upon this ruling the State did in fact prove the fourteen separate transactions, two of which took place in Pittsburgh, Pennsylvania, a locality far removed from the jurisdiction of any state court of Florida. Upon the conclusion of the State's case in chief, petitioners moved anew for a compulsory election by the State of a single act of grand larceny by false pretenses that would be relied on for conviction under the single count in the information. This motion was also denied. Upon the conclusion of the taking of all testimony the Court charged the jury, and submitted the case to it with the result that a general verdict of "Guilty, Grand Larceny" was returned. Upon appeal the District Court, Third District, affirmed the judgment which was entered by the trial court pursuant to the jury's verdict.

Petitioners' primary contention is that this decision is not only erroneous and contrary to established precedent but in holding that under the facts of this case as set forth on the face of the opinion of the District Court the State was not required to make a compulsory election, said Court's decision is in direct conflict on the same point of law with many of the Supreme Court's previous decisions.[1]

We deem it appropriate initially to decide this first contention of petitioners because if it is well taken this Court undoubtedly has jurisdiction to entertain the petition for certiorari. Moreover if this position is well founded and if this Court adheres to its former decisions to the effect that the so-called "single impulse theory" is not

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[1]Hamilton v. State, 129 Fla. 219, 176 So. 89, 112 A.L.R. 1013; Green v. State, 134 Fla. 216, 183 So. 728; Connor v. State, 29 Fla. 455, 10 So. 891; Campbell v. State, 155 Fla. 359, 20 So.2d 127; Hearn v. State, Fla., 55 So.2d 559, 28 A.L.R. 2d 1179; and Hall v. State, Fla., 66 So. 2d 863.

tenable our decision must be one quashing the decision of the District Court and directing that said Court enter its mandate of reversal.

Petitioners pose their main query in the following language:

> "WHETHER OR NOT THE STATE MUST ELECT ONE OF NUMEROUS ACTS OF GRAND LARCENY BY FALSE PRETENSES PUT IN EVIDENCE IN A PROSECUTION FOUNDED ON AN INFORMATION WHICH CHARGES, IN A SINGLE COUNT, A SINGLE ACT OF GRAND LARCENY BY FALSE PRETENSES?"

In its brief the State says that the foregoing query presented by petitioners should be framed as follows:

> "WHETHER OR NOT THE SUPREME COURT OF FLORIDA WILL REVIEW BY CERTIORARI THE DECISION OF THE DISTRICT COURT OF APPEAL RELATING TO AN ASPECT OF THE RECORD ANALOGOUS TO THE SUFFICIENCY OF THE EVIDENCE TOWIT: THE ELECTION OF CERTAIN ACTS OF GRAND LARCENY WHICH OCCURRED OVER AN EXTENDED PERIOD PURSUANT TO A SINGLE SUSTAINED CRIMINAL IMPULSE IN EXECUTION OF A GENERAL FRAUDULENT SCHEME, WHICH DECISION REVEALS NO DIRECT OR PRIMA FACIE CONFLICT WITH ANY DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT OF FLORIDA ON THE SAME POINT OF LAW."

[1] The question submitted by the State can have but one answer if it is an appropriate query. Certainly if the decision of the District Court in this or any case "reveals no direct or prima facie conflict with any decision of another District Court of Appeal or the Supreme Court of Florida on the same point of law" the jurisdiction of this Court cannot be invoked. It is apodictic that under such asserted fact the "conflict" avenue of approach to this Court's jurisdiction is unavailable. We are convinced however that the decision of the District Court herein, predicated upon the facts enucleated in its opinion, is in direct conflict on the same point of law with several of this Court's previous decisions.

In the Hamilton case, supra, the accused was charged in a single count with a single act of unlawfully receiving stolen property. At the trial the State proved, by the testimony of the prosecuting witness who was an employee of Burdine's Inc., that on three separate occasions to-wit: Before June, 1935 and during June of the same year and in October of that year the accused did with scienter receive stolen goods which the prosecuting witness had stolen from Burdines. In that case defense counsel moved the trial court to compel the state to elect upon which one of the three transactions it would rely for conviction. This motion was denied. The State placed in evidence all three transactions and the jury failed to specify in its general verdict of guilty upon which single act it found the defendant guilty.

In that case this Court stated:

"The defendant made a motion to quash the information in the court below, but of course this

> question could not be successfully raised thereby, because on its face the information charged only a single offense. However, the point that the court erred in refusing to make the State elect upon which articles received by the defendant the State would maintain and continue its prosecution was directly raised twice during the introduction of the State's testimony and again in the motion for new trial. It was only when the State produced its testimony that it was made to appear that the State had intended to charge several different offenses, or at least intended and endeavored to prove several distinct offenses, under the single count in the information. The error might have been cured if the court had required the State to elect which of these offenses it was relying upon. * * *"

This Court's judgment was couched in the following language: "Judgment is reversed."

The case of Green v. State, supra, involved a single count of grand larceny for the asseverated theft of seven hogs allegedly belonging to the same owner. The proof at trial disclosed the fact that two hogs came from one place and the remaining five hogs came from another. It was evident from the testimony that if the accused stole the seven hogs he necessarily did so by taking them from separate places at different times. In the Green case defense counsel moved the Court to compel the State to elect which of the two transactions it would rely upon for conviction. The motion was denied and of course the State did not elect. The jury returned a general verdict which did not designate upon which of the two transac-

tions the defendant had been found guilty. In finding reversible error and granting an absolute discharge to the defendant the Supreme Court of Florida adopted and pronounced the rule that:

> "When two distinct offenses are charged in an indictment or developed by the evidence, the district attorney should be required to elect on which of the charges he intends to claim a conviction, as soon as he has examined the witnesses far enough to identify the transaction, and in all cases the election must be made before the accused offers his testimony."

In Connor v. State, supra, this Court held that the crime of larceny by false pretenses is effected upon the receipt of, or upon obtaining, the property and we quote:

> "* * * The receipt or obtaining of the property is the consummation of the offense, and in the absence of a valid qualifying statute the place of its receipt is the sole locality of jurisdiction. If the false pretenses are made in one jurisdiction, but the property is obtained in another, the prosecution must, in the absence of such a statute, be instituted in the latter jurisdiction."

We digress for the moment to make the observation that had the State been required to specify, as it should have been, upon which one of the several transactions it elected to stand and had such election been one of the transactions which allegedly took place in Pittsburgh, Pennsylvania, this case would have been dismissed—pronto—for lack of jurisdiction in the Criminal Court of

Record in and for Dade County, Florida. No one can delve into the minds of the jurors and conclude with certainty that it was not one or both of the transactions which took place in Pennsylvania upon which the jury found the petitioners by a general verdict to be "Guilty, Grand Larceny." This paradox emphasizes one of the prime factors underlying the salutary rule set forth by this Court in its decision in the case of Campbell v. State, 155 Fla. 359, 20 So.2d 127.

It is contended by the State that the District Court in its decision merely enunciated a novel principle of law when it adopted the theory of "a single impulse" in the following language:

> "Here the taking of the many checks, although on different dates, as a result of the fraudulent representations of the defendants was a continuous transaction or proceeding instigated by one purpose and impulse. So the separate occasions when money was paid was prompted by **one** design, **one** purpose, **one** impulse and these 'separate' occasions constituted a single or continuous act." TR. p. 19.

The Campbell case discloses the fact that the Supreme Court of Florida had before it for consideration the "single impulse theory." In that case this Court repudiated the "single impulse theory." It can hardly be said that the adoption of that theory by the District Court in this case is not in direct conflict on the same point of law concluded previously and adversely by the Supreme Court in Campbell v. State, supra.

In the Campbell case Mr. Chief Justice Buford speaking for the Court stated:

> " 'Question Two' is based on the erroneous assumption that the record shows that the two counts are based on one and the same transaction and constituted but one offense. The record shows that the first count is based upon a transaction involving a $200 check which occurred on December 15, 1942, while the second count is based upon a transaction involving $800 which occurred on December 30, 1942. **It is true that both transactions resulted from one and the same general scheme and purpose, but each was not the same act as the other.** Under the facts disclosed by the record, the State might have successfully prosecuted the appellant for the larceny of the $200 item referred to in count one and for the larceny of the $800 item referred to in count two, or it might have successfully prosecuted for the offense of receiving property by false pretense as to each transaction. The State chose to prosecute in one instance for larceny and in the other for obtaining property by false pretense." (Emphasis supplied.)

We direct the attention of the reader to said opinion for the reasons underlying the salutary object of the rule which is diametrically opposite to the inevitable result which would follow the adoption of the rule denominated as the "single impulse theory."

In the year 1951 this Court in the case of Hearn v. State, 55 So.2d 559, definitely decided that larceny is not a continuing offense under the law of Florida. We quote the pertinent language from page 560 of that opinion:

> "* * * where property is stolen **from the same owner or** from different owners at different times or places or as a result of a series of acts, **separated in either time, place or circumstances,** one from the other each taking is a separate and distinct offense * * *." (Emphasis supplied.)

See also Hall v. State, Fla., 66 So.2d 863.

[2] The logic and reason of petitioners' position as is stated by them in their brief and which we quote with approval is unanswerable:

> "The ultimate test of the correctness of the petitioners position is to reverse their position with that of the State. If the State had correctly charged the petitioners with fourteen (14) separate larcenies by a fourteen (14) count information and they had urged that they [the petitioners] had committed but one offense, the State would have relied upon the Campbell case to support their position. It is apparent that the petitioners were charged in a single count with a single act of grand larceny by false pretenses. The State put in evidence proof of fourteen (14) separate offenses of larceny by false pretenses. Upon appropriate motions to compel an election the court declined to require the State to choose which single act it would rely on for conviction. The jury verdict is general and it is impossible to ascertain and determine upon which single act that verdict rests. Under the settled law of this State the petitioners are entitled to an absolute discharge. The District Court's decision to the contrary directly conflicts with the prior

cited decisions of this Court. The past decisions of this Court establish a patently correct rule of law and should be adhered to as the controlling law of this State."

Thus far we have concluded that the decision of the District Court affirming the judgment entered at the trial level is in conflict with several decisions previously rendered by the Supreme Court of Florida and that this Court therefore has jurisdiction. We have also decided that in line with our prior decisions on the same point of law the decision of the District Court must be quashed with directions to said court that it render its mandate of "reversal" to the Criminal Court of Record in and for Dade County, Florida.

We feel that it is proper nevertheless to discuss petitioners' point designated as "Point III:"

"THE CRIME OF GRAND LARCENY BY FALSE PRETENSES CANNOT BE BOTTOMED ON A MISREPRESENTATION OF THE VALUE OF MERCHANDISE."

It is the petitioners' view that there must be shown a direct casual relation between the alleged false representation and the parting with property by the prosecutrix in order to establish the crime of larceny by false pretenses.

[3] It should be borne in mind that we have settled the question of this Court's jurisdiction. Consequently we not only have the right but we are charged with the duty of considering this case on its merits as though it had come here originally on appeal.[2]

[2]Tyus v. Apalachicola Northern Railway, Fla.1961, 130 So.2d 580.

In Ex parte Stirrup, 155 Fla. 173, 19 So.2d 712, 713, we stated:

> "* * * Inasmuch as deception is the essence of the crime, there must be a causal relation between the representation or statement made and the delivery of the property."

Again, in Ladd v. State, 17 Fla. 215 (1879), this Court said:

> "* * * In order to convict upon an indictment for the offense, it is necessary to allege that the party, by reason of such false pretenses, was induced to part with the ownership of his property. That is the very gist of the offense. The false representations amount to nothing so far as the prosecutor is concerned, unless he has been induced to part with something valuable.
>
> "It cannot be assumed that every alleged false statement made by the purchaser can be treated as the criminal offense for which this defendant was indicted. * * *"

After having established this Court's jurisdiction we have gone to the record to determine the representations upon which the prosecutrix relied in parting with her money or property. She stated that she relied **solely** on the representation of the value of certain merchandise that had been delivered to her by the petitioners and deposited in her home. We quote from the testimony of Mrs. McAlister:

"Q. Yes, Ma'am. Answer me this question: About this lace factory and that sort of thing, would you have loaned them five cents if you didn't have the ivory in your home and you didn't believe Emile Halfon as to the value of those items?

"A. No, I wouldn't but they gave me that for security.

"Q. Yes, Ma'am. I appreciate that, and I appreciate your candid answer. So we can safely say to this jury that one of the main reasons you gave up these large sums of money, or to invest in this lingerie factory or lace factory in France to save the orphanage or to buy acreage for the orphanage and all this sort of thing—

"A. Yes.

"Q. Let me finish. It is a little lengthy, but that you would not have given them those moneys unless Emile Halfon and Joseph Adjmi had represented to you that these articles in your home were valued at one time at $600,000 and at another time at two million dollars.

"A. I would not have.

"Q. Are we absolutely right there about that, Mrs. McAlister?

"A. Yes."

14] In the case of Criner v. State, 92 Fla. 483, 109 So. 417, this Court stated:

> "The law is well settled that in ordinary business transactions statements of value are mere expressions of opinion, and that erroneous statements of value will not support even a civil action for rescission or cancellation. Glass v. Craig, 83 Fla. 408, 91 So. 332.
>
> "It follows that the alleged false statement as to value set forth in the information does not amount to a criminal act of false pretense. It is a matter of universal knowledge among people of common sense and experience that men's ideas of the values of items of property vary widely, and that the owners of property are inclined to overestimate its value. Prospective purchasers are required in law to take cognizance of this human frailty, and to investigate values on their own account. If they fail to do this, they have no redress at law. And to hold otherwise in a criminal case would be to open the door to a flood of petty prosecutions in all trades and walks of life. * * *"

Value is indeed a matter of opinion and the crime of larceny by false pretenses required a misrepresentation of a past or existing fact as distinguished from mere opinion.

The petitioners' further contentions, first, that they were denied a fair and impartial trial because their request for a change of venue was not granted and, second, that they were also not accorded a fair and impartial trial because the prosecuting attorney in closing argument made a comment which might be considered to have been

a direct or indirect reference or an allusion by innuendo or inference to the fact that the defendants did not testify in their own behalf, need not be discussed but attention is directed to the admonition to trial judges set forth in the excellent opinion of Mr. Justice O'Connell in the case of Singer v. State, Fla. 1959, 109 So.2d 7, and the cautionary notice given to prosecuting officers in our opinions in Way v. State, Fla. 1953, 67 So.2d 321; Trafficante v. State, Fla. 1957, 92 So.2d 811; and Gordon v State, Fla. 1958, 104 So.2d 524.

[5] No question concerning the sufficiency of the evidence has been raised. Moreover had an attempt been made to present such a query we could not have considered it under the ruling which we have been compelled by the irrefragable logic of our prior decisions to make. It has been suggested that the evidence is sufficient to establish the guilt of the petitioners. In the face of such suggestion we are moved to observe that equal justice under law is the capstone of American jurisprudence. Every defendant in a criminal case is guaranteed by Section 11, Declaration of Rights of the FSA—Constitution a fair and impartial trial. We have previously determined that these petitioners were not accorded such a trial. As was stated by Mr. Justice Roberts in Diecidue v. State, Fla. 1961, 131 So.2d 7, 12:

> "Every citizen's right to a fair and impartial trial by a jury of his peers has been jealously protected over the years by the Supreme Court of Florida. We have held this constitutional guarantee to apply not only to those constituting the upper eschelon of our economic and social life, but just as forcibly to those who might be considered among the dregs of society."

The late Mr. Justice Mathews in the opinion which he prepared for the Court in Bizzell v. State, Fla. 1954, 71 So.2d 735, 738 said:

> "It is more important to preserve them [constitutional guarantees], even though at times a guilty man may go free, than it is to obtain a conviction by ignoring or violating them.[3] The end does not justify the means. Might is not always right. Under our system of constitutional government, the State should not set the example of violating fundamental rights guaranteed by the Constitution to all citizens in order to obtain a conviction."

Again in Boynton v. State, Fla. 1953, 64 So.2d 536, 552, 554, the same eminent jurist, who before his elevation to the bench was generally recognized as an authority on constitutional law, wrote:

> "Every particular section of the Declaration of Rights stands on an equal footing with every other section. They recognize no distinction between citizens. Under them every citizen, the good and the bad, the just and the unjust, the rich and the poor, the saint and the sinner, the believer and the infidel, have equal rights before the law. It is just as much a violation of the Constitution to deny a person the right to worship in accordance with the dictates of his conscience, to suppress the freedom of speech or of the press, or to deny a trial by jury, as it is to violate his right to be secure in his person, house, papers and effects against unreasonable searches and seizures * * *."

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[3]Francois M. A. Voltaire (1694-1778) Zadig. Chap. 6, "It is better to risk saving a guilty person than to condemn an innocent one."

We conclude that the decision of the District Court of Appeal, Third District, herein, should be quashed with the direction that its mandate be one of reversal of the judgment entered in and by the Criminal Court of Record in and for Dade County, Florida, with directions to such court to grant a new trial.

It is so ordered.

TERRELL, Acting C. J., and DREW and CALDWELL, JJ., concurring.

THOMAS, THORNAL and O'CONNELL, JJ., dissenting.

(TITLE OMITTED)

Appeal from Criminal Court of Record for Dade County; George E. Schulz, Judge.

Sibley, Grusmark, Giblin, King & Levenson, Ben Cohen, Miami Beach, for appellants.

Richard W. Ervin, Atty. Gen., and Leonard R. Mellon, Asst. Atty. Gen., for appellee.

Before CARROLL, PEARSON and HENDRY, JJ.

PER CURIAM.

Whereas, the judgment of this court was entered on the 22nd day of February, 1962, and amended on the 8th day of April, 1962, (Fla., 139 So.2d 179) affirming in part and reversing in part the judgments of the Criminal Court of Record in and for Dade County, Florida, in the above styled cause; and

Whereas, on review of this court's judgment, by certiorari, the Supreme Court of Florida, by its opinion and judgment filed May 29, (154 So.2d 812) and mandate dated June 26, 1963, now lodged in this court, quashed this court's judgment with the direction that this court's mandate be one of reversal of the judgment entered in and by the Criminal Court of Record in and for Dade County, Florida, with directions to such court to grant a new trial.

Therefore, it is ordered that the mandate of this court issued in this cause on April 9, 1962, is withdrawn, the judgment of this court filed February 22, 1962 and amended April 8, 1962, is vacated, the opinion and judgment of the Supreme Court of Florida is herewith made the opinion and judgment of this court, and the judgment of the Criminal Court of Record appealed from in this cause is reversed with directions to grant a new trial; costs allowed shall be taxed in the Criminal Court of Record (Rule 3.16, subd. b Florida Appellate Rules, 31 F.S.A.).

APPENDIX D

(TITLE OMITTED)

CASE NO. 64-156

Opinion filed December 29, 1964.

An Appeal from the Criminal Court of Record for Dade County, Gene Williams, Judge.

James W. Kynes, Jr., Attorney General, and Leonard R. Mellon, Assistant Attorney General; Richard E. Gerstein, State Attorney, and Joseph Durant, Assistant State Attorney, for appellant.

Ulrich, Rubin & Berman and Hyman I. Fischbach, for Adjmi and Halfon; Harvey J. St. Jean, for George, appellees.

Before CARROLL, HORTON and HENDRY, JJ.

CARROLL, Judge.

This is an appeal by the State of Florida from an order of the criminal court of record of Dade County holding an initial information was abandoned by the later filing of ten other informations and that the latter were barred by the statute of limitations.

On April 27, 1960, a single count information charged the defendants below with larceny of money, checks and

securities from one Genevra McAlister between the dates of September 1, 1959 and March 5, 1960.[1]

At trial the state presented evidence relating to fourteen separate larcenies. Motion by defendants to require the state to elect and limit prosecution to one was denied. A conviction resulted, which this court affirmed on the "single impulse theory". See Adjmi v. State, Fla.App. 1962, 139 So.2d 179, 185. On certiorari, the Supreme Court of Florida quashed our decision, and ordered that the judgment be reversed and the cause remanded with directions to the trial court to grant a new trial. Adjmi v. State, Fla. 1963. 154 So.2d 812, 819-820. Our mandate was issued accordingly. Adjmi v. State, Fla.App. 1963, 154 So.2d 820.

After the remand and before proceeding with the new trial the state filed ten additional informations on August 2, 1963, each charging one of the larcenies encompassed by the initial information and for which proof had been

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[1]The initial information was as follows: "RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, in and for Dade County, prosecuting for the State of Florida, in the said County, under oath, information makes that JOSEPH ADJMI, CHARLES ADJMI, JOSEPH LEPANTOF, Also Known As JOSEPH LEPENDORF, EMILE HALFON, Also Known As JOHN McGURNEY, LEON ADJMI and ALBERT GEORGE, Also Known As FATHER LEON of the County of Dade and State of Florida, between the 1st day of September, 1959, and 5th day of March, in the year of our Lord, one thousand nine hundred and sixty, in the County and State aforesaid, did then and there unlawfully and feloniously take, steal, and carry away the money, goods and chattels of one GENEVRA M. McALISTER to-wit: CASH, GOOD AND LAWFUL MONEY OF THE UNITED STATES OF AMERICA, CHECKS, NEGOTIABLE BONDS and PREFERRED STOCK, a further and more particular description of said money, goods and chattels being to the State Attorney unknown, being then and there of the value of MORE than ONE HUNDRED DOLLARS ($100.00) good and lawful money of the United States of America, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida."

offered at the first trial. They were so regarded in the briefs and argument, and no contention is made that the offenses separately charged in the new informations were not among those sought to be proved under the initial information on the first trial.[2]

The trial judge granted defendants' motions to quash and entered the order appealed from, which, as stated above, held that the initial information was abandoned and that the new informations were barred by the statute of limitations. In so holding the able trial judge was in error, and we reverse.

In the opinion by the Supreme Court in this case (154 So.2d 812), it was held that this series of larcenies, from the same owner at different times and places, constituted separate and distinct offenses; that the "single impulse theory" had been rejected earlier in Campbell v. State, 155 Fla. 359, 20 So.2d 127; and that at the trial (on the single count information) the state should have been required to specify "which one of the several transactions it elected to stand on".[3]

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[2]These informations separately charged larcenous taking by defendants from the said McAlister, of the following: (1) Check for $6,500 on November 10, 1959; (2) Check for $30,000 on November 17, 1959; (3) Check for $56,000 on December 17, 1959; (4) Check for $5,000 on January 5, 1960; (5) Check for $90,000 on January 7, 1960; (6) Check for $100,000 on January 15, 1960; (7) Check for $18,500 on January 21, 1960; (8) Checks for $199,995.92 on January 17, 1960; (9) Cash and checks of $71,791.54 on February 10, 1960; (10) Check for $7,126.28 on March 3, 1960.

[3]In discussing the need to elect at the first trial, the Supreme Court noted that several of the transactions were shown to have taken place in another state, and remarked that if one of those had been singled out by the state for prosecution a dismissal would have followed. The fact that several of the fourteen claimed larcenies took place out of the state may serve to explain why, after remand, in preparing to prosecute them separately, the state filed informations on only ten.

The effect of the reversal of the judgment of conviction and the remand for new trial left the case standing as if the judgment had not been rendered, and restored the cause to the position it held before the first trial. Ex parte Livingston, 116 Fla. 640, 156 So. 612; Kaminski v. State, Fla.1954, 72 So.2d 400.

By remanding the cause for new trial, the Supreme Court necessarily treated the initial information as being sufficient for prosecution of one, but only one, of the larcenies provable thereunder as the state should elect. But it was made equally clear that in order to prosecute the others which the initial information concerned, it would be necessary to charge such offenses in separate counts or informations.

The several transactions occurred on various dates between November of 1959 and March of 1960. The initial information, filed in April of 1960 was well within the two-year limitation period. § 932.05 Fla.Stat., F.S.A. The ten later informations, filed August 2, 1963, more than two years after the offenses, would be barred by the statute of limitations unless they were in continuation of the initial prosecution, which had been instituted timely.

It is our opinion that the holding of the trial court that the subsequent ten informations were barred by the statute of limitations was in error because it sufficiently appeared they were in continuation of the original cause. This was disclosed by the circumstances of the case (the need, after remand to separately charge the several offenses encompassed by the initial single count information) and from statements in the new informations link-

ing them with the first.[4] Rouse v. State, 44 Fla. 148, 32 So. 784; Horton v. Mayo, 153 Fla. 611, 15 So.2d 327; Meade v. State, Fla. 1958, 101 So.2d 373; State v. Emanuel, Fla. App. 1963, 153 So.2d 839.

In Meade v. State, supra, the Supreme Court held a subsquent information was so barred because "there was nothing in the last information to link it with the first". That case and the others cited above stand as authority for the proposition that such informations will not be subject to the statute of limitations when they are shown to be connected with an in continuation of a prosecution timely begun.

In the instant case the statements in the new informations, "linking them with the first", hardly could have been stronger or more definite. Under the cases

[4]In each of the ten informations filed on August 2, 1963, the following was alleged: "That, subsequent to [here inserting the date of the transaction], a Criminal Information was filed on the 27th day of April, 1960, in the Criminal Court of Record in and for Dade County, Florida, being Case No. 60-2001, wherein the said defendants, JOSEPH ADJMI, CHARLES ADJMI, EMILE HALFON, also known as JOHN McGURNEY, and ALBERT GEORGE, also known as FATHER LEON, were charged with the crime of Grand Larceny. The defendants were arrested on capiases issued in this case and thereafter the defendants, JOSEPH ADJMI, CHARLES ADJMI, and EMILE HALFON, appeared on the 29th day of April, 1960, before the said Criminal Court of Record in and for Dade County, Florida, and entered their respective pleas of not guilty to the charge of Grand Larceny, as recited in Case No. 60-2001. Thereafter, ALBERT GEORGE, also known as FATHER LEON, appeared before the Criminal Court of Record in and for Dade County, Florida, on the 18th day of October, 1960, and entered his plea of not guilty to the charge of Grand Larceny, as recited in Case No. 60-2001. Thereafter, under appropriate proceedings in the Supreme Court of Florida and the District Court of Appeal, Third District, pursuant to these proceedings, a mandate was issued by the District Court of Appeal, Third District, on the 3rd day of July, 1963, returning Case No. 60-2001, charging the said defendants with Grand Larceny, as aforesaid, to the jurisdiction of the Criminal Court of Record in and for Dade County, Florida. Pursuant to said decision and mandate, this is a continuation of the charge of Grand Larceny, as recited in Case No. 60-2001, filed with the Criminal Court of Record in and for Dade County, Florida."

cited above such statements in the new informations of their "linkage" with the first were enough to show they were connected with an in continuation of the original prosecution and thereby to take them out of the statute. Appellees' argument that such a statement in an information alone does not establish that fact so as to avoid the statute of limitations, is without merit here. This is so because in addition the new informations were aided by the showing that the transactions alleged therein were among those which had been proved up on the first trial under the initial information. We hold that the added ten informations were shown to be linked with the first and a continuation of the prosecution which had been timely instituted, and, therefore, that the ten added informations were not barred by the statute of limitations.

The state contends, and we agree, that the trial court was in error in holding that the filing of the ten new informations was an abandonment of the initial information. There is respectable authority for the proposition that the filing of a new indictment or information for an offense charged or included in the first leaves both standing and permits prosecution to proceed under either, where the first has not been quashed or dismissed.[5] See Eldridge v. State, 27 Fla. 162, 9 So. 448; Knight v. State, 42 Fla. 546, 28 So. 759; United States v. Strewl, 2 Cir. 1938, 99 F.2d 474, cert. den., 306 U.S. 638, 59 S.Ct. 489, 83 L.Ed. 1039; Morlan v. United States, 10 Cir. 1956, 230 F.2d 30; State v. Janiec, 20 N.J. Super. 471, 90 A.2d 98; People v. Schildhaus, 15 Misc.2d 377, 180 N.Y.S.2d 377.

---

[5]Because the first information was not quashed or set aside for a "defect, omission or insufficiency in the contents or form thereof", we are not concerned here with § 932.05, Fla.Stat., F.S.A., which allows the filing of a new indictment or information when the earlier one is quashed or set aside after the two-year period has elapsed.

Thus, in this case, the new trial could have proceeded on the initial information or on those later filed, and, therefore, when the trial court ruled that the ten new informations were barred by the statute of limitations the state should have been entitled to prosecute one of the transactions under the first information.

In addition to contending for the statute of limitations, the appellees argued that to try them for the offenses charged in the new informations would constitute double jeopardy, contending they had been tried thereon at the first trial. That argument as to double jeopardy falls, because jeopardy is not considered as having attached where a defendant is erroneously convicted and obtains a reversal of the judgment. Lovett v. State, 33 Fla. 389, 14 So. 837; McNish v. State, 47 Fla. 69, 36 So. 176; § 920.09, Fla. Stat., F.S.A.

Accordingly the order appealed from is reversed, and the cause is remanded for further proceedings not inconsistent herewith.

Reversed and remanded.

APPENDIX E

(TITLE OMITTED)

CASE NO. 66-873

Opinion filed April 9, 1968.

An Appeal from the Criminal Court of Record for Dade County, Carling Stedman, Judge.

H. I. Fischbach; Podhurst & Orseck, for appellant.

Earl Faircloth, Attorney General and Jesse J. McCrary, Jr., Assistant Attorney General, for Appellee.

Before CHARLES CARROLL, C.J., and PEARSON and HENDRY, JJ.

PEARSON, Judge.

The appellant, Charles Adjmi, was tried before the court without a jury upon an information charging grand larceny. He was adjudged guilty and sentenced to imprisonment at hard labor in the State penitentiary for a term of five years. This appeal is from that judgment and sentence.[1] We affirm.

---

[1]See also Adjmi v. State, Fla.App. 1962, 139 So.2d 179; Adjmi v. State, Fla.1963, 154 So.2d 812; State v. Adjmi, Fla.App. 1964, 170 So.2d 340.

The appellant has presented four points upon appeal. The first of these urges the trial court committed error in denying defendant's motions for directed verdicts. This point is essentially an argument that the weight of the evidence was not sufficient to establish appellant's guilt beyond a reasonable doubt as required by law.

In a trial before a court, without a jury, as here, the law is well-settled; the credibility of witnesses and the weight of their testimony are questions for the determination of the judge, whose function it is to draw all reasonable deductions from the evidence. In such cases, the Judge is in a position to evaluate the testimony and discard that which is improper or which has little or no evidentiary value. See Eizenman v. State, Fla.App. 1961, 132 So.2d 763; Spataro v. State, Fla.App. 1965, 179 So.2d 873.

The facts of this case reveal evidence which, if believed by the trier of fact, established an elaborate scheme by which the prosecutrix, who was an elderly woman, was lead like a child through various theatrically staged situations so she would deliver, to the appellant and others, a large sum of money. There is absolutely no doubt from the evidence of appellant's participation and that the scheme was conceived and carried out solely for the purpose of larceny which was accomplished. We think the evidence is clearly insufficient to sustain the judgment. Cf. Smith v. State, 74 Fla. 594, 77 So. 214 (1917).

Appellant's second point urges the court erred in admitting testimony as to unsolicited incriminating statements made by the appellant to another person, who subsequently testified at the trial. It is urged that because

the witness was employed by the State Attorney's office, the statements were inadmissible under the holdings of Massiah v. United States, 377 U.S. 201, 12 L.Ed. 246, 84 Sup.Ct. 1199 (1964); Collins v. State, Fla.App. 1967, 197 So.2d 574; Williams v. State, Fla. App. 1966, 188 So.2d 320. It appears from the record that the witness, John R. Walsh, was employed by the State Attorney's office to help in accounting investigation; that the appellant sought out the witness for his own purposes and that the appellant asked the witness to intervene in his behalf in an attempt to escape prosecution. The appellant further proposed that the witness act as an intermediary in a restitution attempt. The appellant approached the witness with full knowledge of his employment by the State Attorney's office and, with knowledge of this fact, sought to use the witness as an intermediary for purposes of his own. Under these circumstances, the admonitions against in custody interrogations contained in the cases relied upon are not applicable. Cf. Anderson v. State, Fla.App. 1968, ___So.2d___ [opinion filed March __, 1968] See also Montgomery v. State, Fla. 1965, 176 So.2d 331; State v. Outten, Fla. 1968, 206 So.2d 392; Biglow v. State, Fla.App. 1967, 205 So.2d 547."

Appellant's third point urges the trial judge committed error in failing to direct a verdict for the appellant at the close of the State's case in chief because the evidence revealed the prosecution was barred by the statute of limitations. We think the law on this point has been adequately dealt with in our opinion of State v. Adjmi, Fla.App. 1964, 170 So.2d 340. It is not necessary to restate the facts upon which that opinion rests, but it is sufficient to point out that after outlining the history of this case in the trial and appellate courts upon the present

charge, we held it sufficiently appeared that the subsequent ten informations were in continuation of the original cause. A review of the record shows this fact still appears.

Appellant's fourth point is as follows:

> "The trial court committed error in not requiring the State Attorney to produce all prior statements of the prosecutrix concerning the case on trial for use in her cross examination and impeachment, in not affording the defense complete access to such of her statements as the State did produce thereby preventing the defense from assessing and utilizing them in their entirety for cross examination and impeachment, and in restricting the defense to the use of only designated portions of such statements after the trial court examined them in camera."

It should be noted that appellant does not object upon the basis that he was not allowed to examine particular statements of the witness given to the prosecuting attorney, but rather, that the State was not required to produce "**all** statements' memoranda or other documents furnished or secured from the witness." Appellant relies upon Jencks v. United States, 353 U.S. 657, 1 L.Ed. 2d 1103, 77 Sup.Ct. 1007 (1957).

The courts in Florida have held that the defendant in a criminal case is not entitled to inspect (whether before or during trial) the statements of a prosecution witness which were taken by a prosecuting officer in preparation for trial, whether or not such statements are

sought for the purpose of cross-examination or impeachment. McAden v. State, 155 Fla. 23, 21 So.2d 33 (1945), cert. den., 326 U.S. 723, 90 L.Ed. 429, 66 S.Ct. 28.

In Jackman v. State, Fla.App. 1962, 140 So.2d 627, the court rejected the defendant's contention that the trial court committed error in denying his motion to produce statements made by witnesses to the prosecuting attorney and his investigators. The court relied on the rule that a defendant is not entitled to transcript of statements made by prosecution witnesses in the course of preparation for trial unless they were taken before a magistrate or are used by the prosecution at trial.

In Bedami v. State, Fla.App. 1959, 112 So.2d 284, it was held that the defendant's application, made during trial for a subpoena duces tecum to compel the production of the stenographic notes and transcription of a statement previously made by a prosecution witness to the county solicitor, was properly denied. The ruling of the trial court was held to be correct notwithstanding the defendant's contention that he had learned independently of possible inconsistencies between the testimony sought for production and the testimony given at trial; that the production and inspection of the statement were essential to administration of justice, and that the defendant might be enabled to properly cross-examine the witness and lay the proper predicate for impeachment of the witness. The court further held the statements of witnesses taken before the solicitor of a criminal court of record, as in the present case, are not official documents, but in effect the work product of the officer. See also Raulerson v. State, Fla. 1958, 102 So.2d 281; Ezzell v. State, Fla.1956, 88 So.2d

280; Coco v. State, Fla.1953, 62 So.2d 892; Williams v. State, 143 Fla. 826, 197 So. 562 (1940); State v. Shouse, Fla.App. 1965, 177 So.2d 724, 730; Urga v. State, Fla.App. 1958, 104 So.2d 43.

Appellant's last point urges error upon the denial of defendant's motion for new trial. No ground for reversal, not already discussed, is presented under this point.

Having reviewed the record in the light of appellant's brief and argument, and finding error has not been demonstrated, the judgment and sentence are affirmed.

Affirmed.

APPENDIX F

(TITLE OMITTED)

CASE NO. 66-873

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

WILLIAM P. CARTER
Clerk District Court of
Appeal, Third District
Signature illegible
Chief Judicial Clerk
cc: Podhurst & Orseck
Jesse J. McCrary, Jr.
H. I. Fischbach
J. F. McCracken

(The Mandate in the above styled cause has today been issued and mailed to the Clerk of the Criminal Court of Record for Dade County, Florida)

APPENDIX G

(TITLE OMITTED)

CASE NO. 37,417

DISTRICT COURT OF APPEAL, THIRD DISTRICT

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court.
cc: Honorable William P. Carter
Honorable J. F. McCracken
Honorable H. I. Fischbach
Honorable Jesse J. McCrary, Jr.

APPENDIX H

(TITLE OMITTED)

CASE NO. 37,417

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:

SID J. WHITE
Clerk, Supreme Court

(I have today mailed to the Clerk of the District Court of Appeal, Third District, Order of September 30, 1968 in the above cause)

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1969

CHARLES ADJMI,

Petitioner,

v.

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including 30 March, 1969.

/s/ ABE FORTAS
Associate Justice of the Supreme Court of the United States

Dated this 27th day of January, 1969

LIBRARY
SUPREME COURT, U. S.

FILED
MAY 2 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1216

CHARLES ADJMI,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

BRIEF FOR THE RESPONDENT

EARL FAIRCLOTH
Attorney General
State of Florida

JESSE J. McCRARY, JR.
Assistant Attorney General
State of Florida

Counsel for Respondent
530 State Office Building
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Miami, Florida 33136

MIAMI REVIEW — 371-4653 — 377-3721

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1968

No. _____

CHARLES ADJMI,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at 208 So.2d 859 (Fla. 3rd D.C.A. 1968). Order denying Petition for Rehearing was entered on May 1, 1968, said order is annexed hereto as Exhibit A.

The Supreme Court of Florida denied Petition for Writ of Certiorari on September 30, 1968. A copy is annexed as Exhibit B.

The decision of the Supreme Court of Florida is reported at 218 So.2d 163 (Fla. 1968). Petition for Rehearing was denied on October 31, 1968. Motion to stay Mandate was denied by the Supreme Court of Florida on November 13, 1968.

Application for stay was denied by Mr. Justice Black on December 4, 1968, and Renewed Application for stay was denied by him on December 28, 1968.

Application for Extension of Time in which to file Petition for Writ of Certiorari was granted by Mr. Justice Fortas extending the time for filing to and including March 30, 1969.

The defendant was adjudicated guilty of larceny and sentenced by the Criminal Court of Record In and For Dade County, Florida, on October 6, 1966 to five years imprisonment.

Opinions of Florida Courts rendered in proceedings prior to the second trial are reported at 139 So.2d 179 (Fla. 1962), 170 So.2d 340 (Fla. 3rd D.C.A. 1964); 182 So.2d 242 (Fla. 1966).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

The respondent respectfully rephrases the first question presented by the petitioner to read as follows:

I

WHEN A CONVICTION IS REVERSED FOR A NEW TRIAL BASED UPON FAILURE OF THE PROSECUTION TO ELECT A SPECIFIC LARCENY CHARGE, MAY ADDITIONAL CHARGES BE FILED, AFTER THE STATUTE OF LIMITATIONS HAS RUN, WHERE THE SUBSEQUENT CHARGES WERE AMONG THOSE CHARGED IN THE FIRST INFORMATION, AND THE FIRST INFORMATION HAS NOT BEEN QUASHED OR DISMISSED?

II

WHETHER THE UNSOLICITED STATEMENTS, OF A DEFENDANT ACCUSED, MADE TO ANOTHER ARE ADMISSIBLE IN THE DEFENDANTS TRIAL, NOTWITHSTANDING THE FACT THAT THE PARTY TO WHOM THEY WERE MADE IS EMPLOYED BY THE PROSECUTION?

III

WHETHER THE JUDGE MAY REFUSE THE DEFENDANT'S REQUEST TO INSPECT, FOR CROSS EXAMINATION AND IMPEACHMENT PURPOSES, THE TESTIMONY OF A WITNESS TAKEN BEFORE THE STATE'S ATTORNEY IN PREPARATION FOR TRIAL?

REASONS FOR NOT GRANTING THE WRIT

I

THE AMENDED INFORMATIONS

The argument raised by the petitioner clearly is without support in fact, reason, or law. The position taken by the Third District Court of Appeal of Florida is substantially supported by both state and federal law and lack of due process, nor double jeopardy were present in this cause.

Federal authority for the position taken is found in **Morlan v. United States**, 230 F.2d 30 (10th Cir. 1956).

In **Morlan**, supra, the appellant charged that the court had no jurisdiction to try him because there was an information and an indictment to try him. The information issued before the indictment, and charged Morlan with knowingly transporting one Patricia Hyde across state lines for the purpose of prostitution. Morlan was tried, but no verdict was reached. Subsequently an indictment was issued, charging the appellant with transporting one Beth Mounteer across state lines for prostitution.

Morlan protested on grounds that the court had no authority to try him and that the indictment superseded the information and he should not be tried on the information. The 10th Circuit rejected his contention because it was found that both ladies were transported on the same occasion. See also, **United States v. Strewl**, 99 F. Reporter 2d 474 (2nd Cir. 1938).

The argument advanced by the petitioner as regards double jeopardy is equally meritless. The double jeopardy provision of the Constitution does not preclude the government from retrying a defendant whose conviction is set aside because of an error in proceeding leading to conviction. **United States v. Tateo,** 84 S.Ct. 1587; See also **Forman v. United States,** 80 S.Ct. 481.

It is respectfully submitted that the decision below turns upon its own facts, and it will affect few others than the litigants. The appellate courts of Florida properly reached the right decision and nothing in their pronouncement runs afoul the federal standards.

II

THE UNSOLICITED STATEMENTS

The petitioner cites numerous cases for the proposition that he was denied his right to counsel.

The recent trilogy of Supreme Court dcisions which stressed one's right to be represented by counsel, does not include, within its purview, the present factual setting.

Briefly, these cases are; (1) **Massiah v. U.S.,** 377 US 201, 12 L.Ed. 246, 84 S.Ct. 1199 (1964). Therein, the defendant had been indicted, retained counsel, entered a plea of not guilty and was released on bail. Thereafter, a co-defendant, unknown to Massiah, agreed to co-operate with Federal officers in their investigation of Massiah's narcotics activity. He permitted the officers to install a radio transmitter in his automobile whereby the officers would be able to overhear conversations carried on therein.

The co-defendant then conversed with Massiah in the former's automobile. By pre-arrangement and without Massiah's knowledge, a Federal officer listened to said conversation over the aforementioned radio. Massiah made several incriminating statements which were admitted into evidence at his trial.

On these facts, the United States Supreme Court held that Massiah's right to counsel under the Sixth Amendment had been violated . . .

> " . . . [W]hen there was used against him at his trial evidence of his own incriminating works, which Federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." **Massiah v. U.S.**, 377 US at 206, 12 L.Ed. 2d at 250. (emphasis ours)

(2) **Escobedo v. Illinois,** 378 U.S. 478, 12 L.Ed 2d 977, 84 S.Ct. 1758 (1964). Herein the Supreme Court excluded evidence elicited from a defendant once

> "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer and the police have not effectively warned him of his absolute constitutional right to remain silent." 378 US at 490-491, 12 L.Ed.2d at 986.

Florida has chosen to apply **Escobedo** only under the same factual circumstances presented therein. See, also **Montgomery v. State,** 176 So.2d 331 (Fla., 1965).
(3) **Miranda v. Arizona,** 384 U.S. 346, 86 S.Ct. 1602 (1966). This decision may fairly be read as a scathing indictment of police interrogation. The Supreme Court characterized that which it sought to prohibit:

> " . . . incommunicado interrogation of individuals in a police dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." 16 L.Ed.2d at 707.

A synoptic reading of these cases clearly shows that the prohibitions and safeguards were measured for other situations and they are unavailable in the present case where incriminating statements were made in ordinary conversation which had not been instigated for a deliberately interrogative purpose.

The record reveals, from the testimony of John R. Walsh, (a) the appellant sought out the witness and not vice-versa. (R. 273); (b) that the appellant asked the witness to intervene on his behalf with the prosecutrix (R. 277); (c) that the appellant proposed to the witness that he act as an intermediary in a restitution attempt. (R. 277); (d) that the appellant declared, under no interrogation whatsoever, that he would plead guilty and throw himself on the mercy of the court. (R. 279); (e) that the appellant had requested of the witness that he (Walsh) gauge the feelings of Mrs. McAllister, the state and others concerned. (R. 279); (f) that the witness was employed by the State Attorney's Office for a specific

purpose, to-wit; assisting the bank. (R. 281); (g) that the witness was employed by the prosecutrix and her nephew; (h) that the witness held various other jobs while working with the State Attorney (R. 287); (i) that the witness had been approached by the appellant, (R. 288); (j) that the witness had neither asked for nor received any instructions from the State Attorney's Office with respect to the meeting at which the appellant made incriminating statements. (R. 290); (k) that the appellant and his brother knew that the witness was working for the State Attorney's Office. (R. 297); (l) that the witness had been employed by the prosecutrix' nephew, a Philadelphia lawyer, since 1961, as his local agent in the "handling of the several properties and other things that he had administered under a management agreement or trust with Mrs. McAllister." (R. 311); (m) that the witness had been hired as an investigating accountant for the State Attorney's Office. (R. 315-316).

It is not reasonable to say that John R. Walsh was deliberately seeking incriminating evidence from his conversations with the appellant. From the testimony, part of which is shown above, four key facts were adduced and bare repeating:

1. The purpose of his employment with the State Attorney's Office was in connection with the banking records of the appellant and he was under no instructions to elicit any statement from the appellant.

2. The witness was contacted by the appellant, not vice-versa.

3. The witness did not deliberately solicit any incriminating statements, but rather they were volunteered by the appellant, incidental to their relationship which appellant initiated and fostered.

4. Appellant knew the witness was working for the State.

We conclude that the statements made by the appellant to John R. Walsh are admissible as freely given during conversation for other purposes and in no way do they constitute statements drawn from a defendant under interrogation or by deliberate stealth.

Respectfully these statements were given voluntarily and the rights of the petitioner were protected.

III

PRODUCTION OF PRIOR STATEMENTS

Clearly the contentions raised by the petitioner are without merit and the relief sought should be denied by this Honorable Court.

The appellant raised the same issue on appeal in the appellate courts of Florida. The appellate court heard these contentions and found them without merit. The reasoning of the court follows and adequately explains that no federal right was violated:

The courts in Florida have held that the defendant in a criminal case is not entitled to inspection (whether before or during trial) of statements of a prosecution

witness which were taken by a prosecuting officer in preparation for trial, whether or not such statements are sought for the purpose of cross-examination or impeachment. **McAden v. State,** (1945) 155 Fla. 523, 21 So.2d 33 cert. denied 326 U.S. 723, 90 L.Ed. 429, 66 S.Ct. 28.

In **Jackman v. State,** (1962 Fla. App.), 140 So.2d 627, the court rejected the defendant's contention that the trial court committed error in denying his motion to produce statements made to the prosecuting attorney and his investigators by witnesses for the prosecution. The court relied on the rule that a defendant is not entitled to a transcript of statements of prosecution witnesses taken by the prosecution in the course of preparation for trial unless they were taken before a magistrate or are used by the prosecution at trial.

In **Bedami v. State,** (1959 Fla. App.) 112 So.2d 284, it was held that the defendant's application, made during his trial in the criminal court of records of Hillsborough County, for a subpoena duces tecum to compel the production of the stenographic notes and transcription of a statement previously made by a prosecution witness to the county solicitor, was properly denied: The ruling of the trial court was held to be correct notwithstanding the defendant's contention that he had learned independently of possible inconsistencies between the testimony sought for production and that given at trial, that the production and inspection of the statement were essential to administration of justice; and that the defendant might be enabled to properly cross-examine the witness and lay the proper predicate for impeachment of the witness. The court further held that the state-

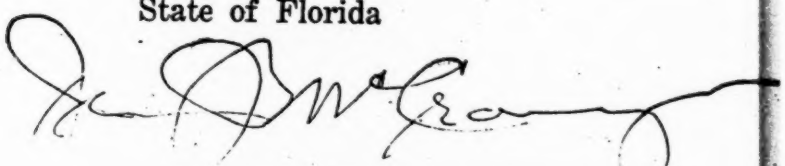
ments of witnesses taken before the solicitor of a criminal court of record, as in the present case, are not official documents, but in effect the work product of the officer. See also, **Mason v. State,** 183 So.2d 236 (Fla. 1966); **State v. Shouse,** (Fla.App. 1965), 177 So.2d 724, 730; **Coco v. State,** (Sup.Ct. 1953), 62 So.2d 892; **Raulerson v. State,** 102 So.2d 281 (Fla. Sup.Ct.); **Williams v. State,** (Sup.Ct. 1940), 197 So. 562; **Ezzell v. State of Florida,** (Fla. Sup.Ct.) 88 So.2d 280; **Urga v. State,** (1958, Fla.App.), 104 So.2d 43; 23 C.J.S. 1157 Section 1036 (1); **Menendez v. United States,** 393 F.2d 312 (5th Cir. 1968).

CONCLUSION

The respondent submits that there was no federal question involved; moreover if this Honorable Court finds that a federal question was presented, the petition for the Writ of Certiorari should be denied since there is no showing of an abridgement of the petitioner's constitutional rights.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General
State of Florida

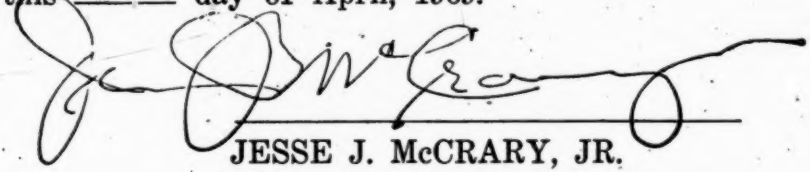


JESSE J. McCRARY, JR.
Assistant Attorney General
State of Florida

AFFIDAVIT OF SERVICE

I, JESSE J. McCRARY, JR., Assistant Attorney General, State of Florida, first being duly sworn according to law, do depose and say:

I HEREBY CERTIFY that three copies of Brief for the Respondent to the Supreme Court of the United States was served upon HONORABLE MILTON E. GRUSMARK, Attorney for Petitioner, 1674 Meridian Avenue, Suite 311, Miami Beach, Florida 33139, by mailing the copies of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this ____ day of April, 1969.



JESSE J. McCRARY, JR.
Assistant Attorney General

SWORN TO AND SUBSCRIBED before me at Miami, Dade County, Florida, this _____ day of April, 1969.

_____
NOTARY PUBLIC
State of Florida

My Commission Expires:

APPENDIX I

(TITLE OMITTED)

Case No. 66-873

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.
A True Copy

ATTEST:

WILLIAM P. CARTER
Clerk, District Court of
Appeal, Third District

Signature illegible
Chief Judicial Clerk

cc: Podhurst & Orseck
Jesse J. McCrary, Jr.
H. I. Fischbach
J. F. McCracken

(The Mandate in the above styled cause has today been issued and mailed to the Clerk of the Criminal Court of Record for Dade County, Florida)

(Exhibit A)

APPENDIX II

(TITLE OMITTED)

Case No. 37,417

DISTRICT COURT OF APPEAL, THIRD DISTRICT

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

TEST:
Sid J. White
Clerk, Supreme Court.

cc: Honorable William P. Carter
Honorable J. F. McCracken
Honorable H. I. Fischbach
Honorable Jesse J. McCrary, Jr.

(Exhibit B)